83-533

Supreme Court, U.S.
FILED
SEP 28 1983
ALEXANDER L. STEVAS,
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA;
LOUISIANA SOYBEAN ASSOCIATION; AND
MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:
VERNER, LIIPFERT, BERNHARD
AND MCPHERSON, CHARTERED
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036
(202) 452-7400

FRITZ R. KAHN
(*Counsel of Record*)
RUSSELL E. POMMER
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036
(202) 452-7484
Attorneys for Petitioner

Date: September 28, 1983

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Petitioner Jerry K. Nicholson* submits the following question:

Whether the court of appeals erred in concluding that the Interstate Commerce Commission properly deregulated the construction of major railroad classification yards, notwithstanding the clear requirement of 49 U.S.C. §§ 10901(a) and 10102(19) that such railroad line extensions or additions be certificated by the agency.

---

* Petitioner Jerry K. Nicholson is an individual. The caption in the case in this Court contains all parties in the proceeding before the court of appeals. Holloway Planting Co. had been an additional petitioner in the proceeding before the court of appeals, but was dismissed voluntarily as a party.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
I. As A Result Of A Shallow Statutory Analysis And A Failure To Recognize This As A Case Of First Impression, The Court Of Appeals Has Permitted The Interstate Commerce Commission To Deregulate The Construction Of Railroad Classification Yards In A Manner Contrary To Legal Requirements And Adverse To An Orderly Reduction In That Agency's Jurisdiction	6
II. In Holding That The Construction Of All Track Segments Not Physically Required For A Railroad's Service Between The Points Of Shipment And Delivery Is Exempt, The Court Of Appeals Erroneously Has Decided An Important Question Of Federal Law That Should Be Settled By This Court	12
CONCLUSION	13
APPENDICES	
A. Decision Of The United States Court Of Appeals For The District Of Columbia Circuit In No. 82-1428, Decided June 30, 1983	1a
B. Decision Of The Interstate Commerce Commission In Finance Docket No. 29557, Decided February 11, 1982	14a
C. Decision Of The Interstate Commerce Commission Review Board No. 3 In Finance Docket No. 29657, Decided August 28, 1981	23a
D. Judgment Of The United States Court Of Appeals For The District Of Columbia Circuit In No. 82-1428, Dated June 30, 1983	26a

TABLE OF AUTHORITIES

CASES: Page

Boston Terminal Co. Reorganization, 312 I.C.C. 373 (1960) 10

Detroit & M. Ry. v. *Boyne City, G. & A. R.R.*, 286 F. 540 (E.D. Mich. 1923) 10, 11

Georgia Southern & F. Ry. v. *Duval Connecting R.R.*, 324 F.2d 801 (5th Cir. 1963) (per curiam) 10

Lewis v. *United States*, 445 U.S. 55 (1980) 8

Long Island R.R. v. *New York Central R.R.*, 281 F.2d 379 (2d Cir. 1960) 9

New Orleans Terminal Co. v. *Spencer*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) . 10, 11, 12

Nicholson v. *ICC*, 711 F.2d 364 (D.C. Cir. 1983) .. *passim*

Nicholson v. *Missouri Pacific R.R.*, 366 I.C.C. 69 (1982) ..... *passim*

Office of Communication of United Church of Christ v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983) 8

Oregon-Washington R.R. & Navigation Co. Construction, 275 I.C.C. 591 (1950) 10

Piedmont & Northern Ry. v. *ICC*, 286 U.S. 299 (1932) 7

Railroad Comm'n. v. *Southern Pacific*, 264 U.S. 331 (1924) 7, 11, 12, 13

Terminal Ry. Ala. State Docks—Operation, Mobile, Ala., 354 I.C.C. 747 (1978) 10-11

Texas & P. Ry. v. *Gulf, C. & S.F. Ry.*, 270 U.S. 266 (1926) 7, 10, 11, 12

STATUTES:

28 U.S.C. § 1254(1) (1976) 2

28 U.S.C. § 2321 (1976 and Supp. V 1981) 5

28 U.S.C. § 2341 (1976) 5

28 U.S.C. § 2342 (1976 and Supp. V 1981) 5

49 U.S.C. § 10101a (Supp. V 1981) 8

49 U.S.C. § 10102(19) (Supp. V 1981) 3, 9

49 U.S.C. § 10505 (Supp. V 1981) 8

Table of Authorities Continued

Page

49 U.S.C. § 10901(a) (Supp. V 1981) ..... *passim*
49 U.S.C. § 10907(b) (Supp. V 1981) ..... *passim*
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980) 7

MISCELLANEOUS:
H.R. Rep. No. 1430, 96th Cong., 2d Sess. (1980) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. ___

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA;
LOUISIANA SOYBEAN ASSOCIATION; AND
MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Jerry K. Nicholson respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review and reverse a decision entered by that court on June 30, 1983, affirming an Interstate Commerce Commission decision not to regulate the Missouri Pacific Railroad Company's construction of a 550 acre, $75 million railroad classification yard.

OPINIONS BELOW

The decision by the United States Court of Appeals for the District of Columbia Circuit, reproduced as Appendix ("App.") A hereto, is reported as *Nicholson* v. *ICC*, 711

F.2d 364 (D.C. Cir. 1983). In that decision the court affirmed a February 11, 1982, decision of the Interstate Commerce Commission ("Commission") in Finance Docket No. 29657, reported as *Nicholson* v. *Missouri Pacific R.R.*, 366 I.C.C 69 (1982). That Commission decision, reproduced as App. B hereto, in turn affirmed an August 28, 1981, decision of the Commission's Review Board No. 3. The decision rendered by Review Board No. 3 is reproduced in App. C hereto.

JURISDICTION

The decision and judgment of the court of appeals were entered on June 30, 1983, and neither a petition for rehearing nor a suggestion for rehearing *en banc* were filed. Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Three statutory provisions are involved in this case.[1]

49 U.S.C. § 10901(a) (Supp. V 1981) provides:

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension of any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

---

[1] These provisions are the codification, without substantive change, of provisions of the former Interstate Commerce Act.

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

49 U.S.C. § 10102(19) (Supp. V 1981) states as follows:

§ 10102. Definitions

In this subtitle—

* * *

(19) "railroad" includes—

(A) a bridge, car float, lighter, and ferry used by or in connection with a railroad;

(B) the road used by a rail carrier and owned by it or operated under an agreement; and

(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

49 U.S.C. § 10907(b) (Supp. V 1981) provides:

§ 10907. Exceptions

* * *

(b) The Commission does not have authority under sections 10901-10906 of this title over—

(1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State; or

(2) a street, suburban, or interurban electric railway that is not operated as part of a general system of rail transportation.

STATEMENT OF THE CASE

This case concerns the proposed construction, by Missouri Pacific Railroad Company ("Missouri Pacific"), of a railroad classification yard covering in excess of 550 acres in Pointe Coupee Parish, Louisiana, on land mostly owned by Petitioner Jerry K. Nicholson ("Nicholson"). Nicholson's land currently is used to grow soybeans and other crops. Missouri Pacific, a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission, has a right-of-way across Nicholson's land for the operation of a single track line of railroad.

On May 22, 1981, Nicholson, along with other landowners not parties to this case, filed a complaint with the Interstate Commerce Commission, because Missouri Pacific, without having sought or obtained from the Commission a certificate of public convenience and necessity in accordance with 49 U.S.C. § 10901(a), had filed an eminent domain action in the 18th Judicial District Court for the Parish of Pointe Coupee, State of Louisiana, to condemn or expropriate all or part of Nicholson's lands for "a new modern railroad yard facility and related facilities and appurtenances." Missouri Pacific's proposed railroad yard was to be built adjacent to its track on Nicholson's land, and would enable the carrier to classify or sort and redirect the day-to-day flow of traffic only a portion of which heretofore had been handled on the single track traversing Nicholson's property. Nicholson argued that the railroad yard would be an extension of a railroad line or an additional railroad line, the construction of which could take place only pursuant to a Commission "public convenience and necessity" finding.

The Commission's Review Board No. 3 dismissed the complaint in a decision dated August 28, 1981 (App. C), concluding that it was premature. Nicholson took an ad-

ministrative appeal, and, by its decision of February 11, 1982 (App. B), the Commission affirmed Review Board No. 3's dismissal, but on different grounds. Finding that the complaint was not premature, the Commission then concluded that Missouri Pacific's proposed railroad classification yard was not a railroad line extension or addition within the meaning of section 10901. 366 I.C.C. at 74; App. at 21a. The Commission stated that it could find no instance where the construction of a railroad yard had been held to require Commission approval under section 10901(a) (or its predecessor, section 1(18) of the former Interstate Commerce Act), and that the reason "the issue arises so rarely" is that "in the few instances in which it has been raised, yard track has been found clearly exempt." 366 I.C.C. at 73; App. at 20a.

The court of appeals, in the decision herein sought to be reviewed (App. A),[2] affirmed the Commission "[b]ecause well-established judicial and Commission precedent compel the conclusion that the proposed . . . classification yard is not a 'railroad line' requiring Commission approval." 711 F.2d at 365; App. at 3a. It concluded that the determination of whether track segments are "railroad lines" subject to 49 U.S.C. § 10901(a) or, on the other hand, "spur, industrial, team, switching, or side tracks" exempt under 49 U.S.C. § 10907(b) turns on whether or not the track segments are required for a railroad's service between points of shipment and delivery (track segments not so required are exempt). 711 F.2d at 368; App. at 8a-9a. Under these principles, it found Missouri Pacific's proposed yard exempt from Commission regulation. Further, the court relied upon its statement that "the Commission has consistently interpreted the Act as not

[2] The court had jurisdiction pursuant to 28 U.S.C. §§ 2321, 2341 and 2342 (1976 and Supp. V 1981).

requiring its approval prior to the construction of yards." 711 F.2d at 368; App. at 10a.

The proposed railroad classification yard that was authorized without a Commission "public convenience and necessity" evaluation will be massive—approximately 3.5 miles long, one-half mile wide, and covering more than 550 acres of land. There will be over 100 miles of track in the yard, used to make up and break up freight trains, as well as to arrange and sort cars. The yard's construction cost is estimated to be $75 million. *See* 711 F.2d at 366; App. at 3a. Additionally, Missouri Pacific "clearly believes that the yard will allow it to provide more extensive and efficient service over its existing rail lines and may permit it to capture additional traffic." 366 I.C.C. at 74; App. at 21a.

REASONS FOR GRANTING THE WRIT

I. As A Result Of A Shallow Statutory Analysis And A Failure To Recognize This As A Case Of First Impression, The Court Of Appeals Has Permitted The Interstate Commerce Commission To Deregulate The Construction Of Railroad Classification Yards In A Manner Contrary To Legal Requirements And Adverse To An Orderly Reduction In That Agency's Jurisdiction

At the heart of the former Interstate Commerce Act ("Act"), and its current codification, is the requirement that a rail carrier subject to the Commission's jurisdiction obtain Commission approval before constructing a railroad line extension or addition. 49 U.S.C. § 10901(a). The Commission must evaluate the proposal and determine whether the present or future public convenience and necessity require or permit the construction. *Id.* This and related provisions establishing extensive Interstate Commerce Commission regulatory oversight were enacted to maintain the integrity of the national railroad

system, *i.e.*, to preserve the earnings capacity and financial resources of individual carriers, and to prevent the waste of resources on the building of unnecessary lines. *Texas & P. Ry.* v. *Gulf, C. & S.F. Ry.*, 270 U.S. 266, 277 (1926). *Accord, Railroad Comm'n* v. *Southern Pacific*, 264 U.S. 331, 341-42 (1924).[3] The Act, of course, contains certain exemptions from Commission regulation, including the exemption now codified in 49 U.S.C. § 10907(b)(1) (Commission jurisdiction does not extend to the construction of intrastate "spur, industrial, team, switching, or side tracks"). However, as this Court has stated, that and comparable exemptions "should be narrowed and limited to effect the remedy intended" by the underlying "remedial" legislation. *Piedmont & Northern Ry.* v. *ICC*, 286 U.S. 299, 311-12 (1932).

Petitioner submits that the court of appeals has failed to interpret § 10907(b)(1) narrowly and, thus, has allowed the Commission to circumvent § 10901(a)'s certification requirement. The implications of the decision, moreover, are far-reaching. What the Commission has done, with the court's concurrence, is to "deregulate" the construction of railroad classification yards—facilities at which railroads sort cars and put trains together to effectuate efficient through transportation movements. The court and Commission holdings technically may be limited to the proposed yard in question, but the underlying principle is sweeping. The import is that the Commission lacks jurisdiction over the construction of such yards, *regardless* of how extensive they are and how much they cost,

---

[3] The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), which effected major revisions in the regulatory scheme in other respects, left undisturbed the fact of Commission oversight of railroad line construction. *See* H.R. Rep. No. 1430, 96th Cong., 2d Sess. 115-16 (1980).

and *regardless* of whether they facilitate major changes in the railroads' overall operations.

The resulting deregulation of railroad classification yards is especially troublesome since the Commission has at its disposal a broad statutory exemption vehicle by which it might effectuate the same change in a permissible fashion. 49 U.S.C. § 10505 (Supp. V 1981). Section 10505, however, requires the Commission to make certain findings before granting an exemption,[4] and the Commission has not made those findings here. Hence, the result of the Commission's action, sanctioned by the court, is at variance with the orderly administration of the underlying transportation statute.[5]

This situation arises because the court of appeals erred grievously in concluding that Missouri Pacific's proposed railroad classification yard is exempt under 49 U.S.C. § 10907(b) rather than a railroad line extension or addition within the meaning of 49 U.S.C. § 10901(a). The court's errors are several.

Although it is axiomatic that the starting point in any case concerning the interpretation of a statute is the language of the statute itself,[6] the court did not follow that approach. Rather than examine the wording of section 10901(a) to see whether the extensive trackage in

---

[4] The Commission must find that the application of a provision is not necessary to carry out the transportation policy of 49 U.S.C. § 10101a and either (1) the transaction in question is of limited scope or (2) the application of the provision is not necessary to protect shippers from the abuse of market power. 49 U.S.C. § 10505.

[5] *Cf.* Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) (agency must adhere to statutory mandate in effecting deregulation).

[6] *E.g.*, Lewis v. United States, 445 U.S. 55, 60 (1980).

Missouri Pacific's proposed yard fairly may be characterized as an extension of or an additional "railroad line," and the wording of section 10907(b) to see whether the trackage fairly may be characterized as "spur, industrial, team, switching or side tracks," the court by-passed an examination of the provisions' plain meaning. *See* 711 F.2d at 366-67; App. at 6a-7a. Yet the statutory language supports petitioner's substantive position. The term "railroad" is defined to include a "yard." 49 U.S.C. § 10102(19)(C). This suggests—even if it does not demonstrate conclusively—that the term "railroad line," as it appears in 49 U.S.C. § 10901(a), includes a "yard."[7] In contrast, the section 10907(b)(1) exemption, covering certain "spur, industrial, team, switching or side tracks," does not include the term "yard," suggesting that ordinarily a railroad classification yard is not exempt from Commission jurisdiction.

Perhaps even more significantly, the court of appeals had absolutely no foundation to believe that judicial and Commission precedent "compel the conclusion" that Missouri Pacific's proposed yard is not a railroad line requiring Commission approval. 711 F.2d at 365; App. at 3a. The instant case—involving the question whether the Commission has jurisdiction over the construction of a massive classification yard that will be used for a substantial enhancement of through railroad movements—is one of first impression. Each of the few cases cited by the

---

[7] The court of appeals has cited *Long Island R.R.* v. *New York Central R.R.*, 281 F.2d 379, 382-83 (2d Cir. 1960), concerning the distinction between the terms "railroad" and "railroad line." 711 F.2d at 369; App. at 10a. At most that case, dealing with off-track freight receiving stations, suggests that the definition of "railroad" does not establish the precise meaning of the term "railroad line"—not that the definition of "railroad" has no probative value.

court in which trackage was found to be exempt under § 10907(b) is distinguishable readily on its facts.[8] The court's additional conclusion that "the *Commission* has consistently interpreted the Act as not requiring its approval prior to the construction of yards" (711 F.2d at 368 (emphasis added); App. at 10a) is equally disturbing. Not only did the Commission itself note (correctly) that the issue had rarely been raised (366 I.C.C. at 73; App. at 20a), but the three cases cited by the court for the Commission's supposedly "consistent" application are completely inapposite.[9]

Further, the court of appeals wrongly suggested that trackage cost has no bearing on whether Commission approval is required prior to construction. 711 F.2d at

---

[8] In the leading cases relied upon by the court, the trackage in question was found to be subject to the Commission's jurisdiction. *E.g., Texas & P. Ry.; New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967); *Detroit & M. Ry.* v. *Boyne City, G. & A. R.R.*, 286 F. 540 (E.D. Mich. 1923). In *Georgia Southern & F. Ry.* v. *Duval Connecting R.R.*, 324 F.2d 801 (5th Cir. 1963) (per curiam), where a proposed railroad yard was found not subject to 49 U.S.C. § 10901(a), the court did not explain the basis for its conclusion and noted that the new facility, which may have had very different characteristics from Missouri Pacific's proposed classification yard, was a replacement for another yard within the same area. The few cases decided by the Interstate Commerce Commission on this subject are discussed in n. 9.

[9] *Oregon-Washington R.R. & Navigation Co. Construction*, 275 I.C.C. 591, 598 (1950), and *Boston Terminal Co. Reorganization*, 312 I.C.C. 373, 378 (1960), do no more than provide *dictum* that the construction of a new yard and the consolidation of terminal facilities are not *within themselves* subject to Commission jurisdiction. (In *Oregon-Washington*, where a yard was involved, its nature was not specified and it may not have been a classification yard at all.) In *Terminal Ry. Ala. State Docks—Operation, Mobile, Ala.*, 354 I.C.C. 747, 749 (1978), the Commission found that certain track to be

369; App. at 10a-11a. A basic purpose of the provision conferring Commission jurisdiction over railroad line construction was to create national regulatory oversight over major railroad expenditures. *Texas & P. Ry.*, 270 U.S. at 277; *Railroad Comm'n* v. *Southern Pacific*, 264 U.S. at 344-47. Moreover, where the exemption applies, "the expenditure involved is ordinarily small." *Texas & P. Ry. Co.*, 270 U.S. at 278.[10]

This Court should not allow the impermissible deregulation of railroad classification yards to stand. Construction of Missouri Pacific's proposed yard is subject to the Commission's jurisdiction under 49 U.S.C. § 10901(a), particularly since that provision was enacted to establish Commission review of major projects having a significant impact on the nature and extent of railroad operations.[11] *See, e.g., Texas & P. Ry.; Railroad Comm'n* v. *Southern Pacific; New Orleans Terminal Co.*

---

used for *switching* purposes was exempt from regulation under the predecessor provision to 49 U.S.C. § 10907(b). Switching track, of course, is exempt by the very terms of section 10907(b). Missouri Pacific's proposed classification yard is distinguishable readily; it will involve far more than switching.

[10] *See also* Railroad Comm'n v. Southern Pacific, 264 U.S. at 344, 346 (expense of track construction discussed); Detroit & M. Ry., 286 F. at 547 (construction expenses one factor considered).

[11] The yard will be geographically large, containing 100 miles of track, and costly to construct. In addition, it will allow the carrier to provide more extensive and efficient service over its existing rail lines and may permit it to capture additional traffic. 366 I.C.C. at 74; App. at 21a.

II. In Holding That The Construction Of All Track Segments Not Physically Required For A Railroad's Service Between The Points Of Shipment And Delivery Is Exempt, The Court Of Appeals Erroneously Has Decided An Important Question Of Federal Law That Should Be Settled By This Court

The court of appeals has announced a new principle of federal law—that "track segments which are merely incidental to, *and not required for*, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b)." 711 F.2d at 368 (emphasis added); App. at 8a-9a. That principle departs from existing judicial standards, *i.e.*, the cases on which the court has relied do *not* establish a rule that track segments are exempt unless actually "required" for through transportation movements. Rather, those cases stand for the proposition that each situation should be examined to determine whether the nature and characteristics, *in toto*, permit application of the exemption. *See Texas & P. Ry.*, 270 U.S. at 278; *Detroit & M. Ry.*, 286 F. at 547; *New Orleans Terminal Co.*, 366 F.2d at 166. *See also Railroad Comm'n* v. *Southern Pacific*, 264 U.S. at 346-47. Although the use of track as part of a main line or for a through transportation movement may indicate that the section 10907(b) exemption is inapplicable, the absence of such main line trackage, or of the necessity of the trackage for a through movement, never has been said to establish conclusively that the trackage construction is exempt.

Thus, the facts that Missouri Pacific's proposed classification yard will not be part of the railroad's main line track, will not extend the railroad's service into any new territory, and will be used *in part* for switching (711 F.2d at 368; App. at 9a) cannot be determinative. Because the classification yard will be a massive and expensive

facility, at which trains will be broken up and reassembled in order to effectuate more extensive and efficient through rail service,[12] its construction constitutes the extension of a railroad line or the addition of a railroad line under 49 U.S.C. § 10901(a). The court of appeals' contrary holding represents a glaring misinterpretation of an important federal statute, requiring correction by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

FRITZ R. KAHN
(Counsel of Record)
RUSSELL E. POMMER
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036
(202) 452-7484
Attorneys for Petitioner

Of Counsel:
VERNER, LIIPFERT, BERNHARD
AND MCPHERSON, CHARTERED
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036
(202) 452-7400

Date: September 28, 1983

---

[12] *See* Railroad Comm'n v. Southern Pacific, 264 U.S. at 346 (track construction not exempt where there were "important changes in the handling of interstate traffic and passengers").

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1428

JERRY K. NICHOLSON, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

LOUISIANA SOYBEAN ASSOCIATION, MISSOURI PACIFIC RAILROAD COMPANY, INTERVENORS

Petition for Review of an Order of the Interstate Commerce Commission

---

Argued January 10, 1983

Decided June 30, 1983

Fritz R. Kahn, for petitioner and intervenor, Louisiana Soybean Association.

Sidney L. Strickland, Jr., Attorney, Interstate Commerce Commission, with whom *John Broadley*, General Counsel, *Ellen D. Hanson*, Associate General Counsel, Interstate Commerce Commission, *John P. Powers, III*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

and *Kenneth P. Kolson*, Attorneys, U.S. Department of Justice, were on the brief, for respondents.

John P. Legendre, for intervenor, Missouri Pacific Railroad Company.

John J. Rademacher, was on the brief for American Farm Bureau Federation, Amicus Curiae, urging that the order under review herein be vacated.

Henry H. Bernard, Jr., was on the brief for Louisiana Farm Bureau Federation, Inc., Amicus Curiae, urging that the order under review herein be vacated.

James I. Collier, Jr., was on the brief for Association of American Railroads, Amicus Curiae, urging affirmance.

Before: ROBINSON, *Chief Judge*, WALD, *Circuit Judge*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

MACKINNON, *Senior Circuit Judge*: Petitioner, Jerry K. Nicholson, challenges an order of the Interstate Commerce Commission (Commission) which dismissed his complaint alleging that the Missouri Pacific Railroad Co. (Missouri Pacific) had violated the Interstate Commerce Act, 49 U.S.C. § 10901(a) (Supp. V 1981),[1] by attempt-

---

[1] 49 U.S.C. § 10901(a) (Supp. V 1981) provides:

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission . . . may—
>
> (1) construct an extension to any of its railroad lines;
>
> (2) construct an additional railroad line;
>
> (3) acquire or operate an extended or additional railroad line; or
>
> (4) provide transportation over, or by means of, an extended or additional railroad line;
>
> only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

ing to build a railroad line—to wit, a classification yard adjacent to its main-line track in Pointe Coupee Parish, Louisiana—on his land without a finding by the Commission of public convenience and necessity. The Commission ruled that the classification yard was not a "railroad line" requiring the approval called for by section 10901 (a), but rather was a switching track excepted from Commission jurisdiction by 49 U.S.C. § 10907(b)(1) (Supp. V 1981).[2] *Nicholson v. Missouri Pacific R.R.*, 366 I.C.C. 69, 72-74 (1982). Because well-established judicial and Commission precedent compel the conclusion that the proposed Missouri Pacific classification yard is not a "railroad line" requiring Commission approval, we affirm the Commission's order.

I.

Petitioner owns farmland in Pointe Coupee Parish, Louisiana, on which he grows soybeans and other crops. Missouri Pacific presently owns a right-of-way over petitioner's land for the operation of a single-line track of railroad, but wishes to construct a classification yard adjacent to its track on petitioner's land. The numerous tracks in the yard will be used to switch cars in the making up and breaking up of freight trains, to arrange cars of trains in delivery order, and to sort cars in trains by types of cars or contents preparatory to train movement.[3] As a public utility, Missouri Pacific has filed

[2] 49 U.S.C. § 10907(b) (Supp. V 1981) (emphasis added) provides:

> The Commission does *not* have authority under sections 10901-10906 of this title over—
>
> (1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, *switching*, or side tracks if the tracks are located, or intended to be located, entirely in one State . . . .

[3] The proposed classification yard will be approximately 3.5 miles long and 0.5 miles wide, will cover approximately 550 acres, and will consist of over 100 miles of track. The facility will cost Missouri Pacific approximately $75 million.

an action under state law in Louisiana state court to acquire by condemnation the necessary portion of petitioner's land. *Missouri Pacific R.R. v. Nicholson*, Civil Action No. 17299 (La. Dist. Ct. 1981).

Petitioner [4] filed a complaint with the Commission seeking a cease and desist order to prevent Missouri Pacific from taking any steps to construct the classification yard without Commission approval pursuant to section 10901 (a).[5] Petitioner contended that the classification yard would be "an additional railroad line" requiring the Commission's prior approval and that the Commission had not made the findings required by the statute. 49 U.S.C. § 10901(a) (Supp. V 1981). A Commission Review Board dismissed the complaint because it was not ripe for review. The Review Board reasoned that a "civil decision against [Missouri Pacific] may totally moot the issue of whether Commission approval of [Missouri Pacific's] construction is required." *Nicholson v. Missouri Pacific R.R.*, Finance Docket No. 29657, slip op. at 2 (Sept. 15, 1981). On appeal, the Commission affirmed the dismissal of petitioner's complaint, although on different grounds. *Nicholson v. Missouri Pacific R.R., supra*, 366 I.C.C. at 69.

The Commission found that the complaint was ripe for review because petitioner had demonstrated "a substantial probability that if the Commission waits, [petitioner] would be harmed by the challenged conduct before the Commission could determine its legality." *Id.* at 72. However, the Commission also found that the operations which would be performed at the classification yard would be *incidental* to main-line transportation and that such transportation would continue over Missouri Pacific's

---

[4] Several other affected landowners joined in petitioner's complaint, but all have subsequently sold their land to Missouri Pacific and are not parties to this appeal. Brief for Intervenor, Missouri Pacific Railroad Co., at 3.

[5] *See* note 1 *supra*.

existing track. Noting that it had consistently held yards exempt from its jurisdiction under section 10907(b),[6] and had never authorized the construction of a classification yard, the Commission ruled that the proposed classification yard was not a railroad line requiring approval pursuant to section 10901(a). *Id.* at 72-74. This petition for review followed.

II.

Petitioner contends that the Commission erred in concluding that construction of the proposed classification yard did not require its approval.[7] Petitioner argues that

---

[6] *See* note 2 *supra.*

[7] Petitioner also raises several frivolous procedural arguments in his petition for review. Petitioner asserts that the Commission erred in denying the requests of the Louisiana Soybean Association, the American Farm Bureau Federation, and the Louisiana Farm Bureau Federation to intervene in the Commission proceeding. However, the Commission properly concluded that these organizations sought

> intervention to present testimony *if the Commission holds a hearing* on whether destruction of agricultural land to build a classification yard is warranted. Because of our ultimate decision dismissing the complaint [for lack of jurisdiction over the proposed construction], no purpose would be served in permitting these parties to intervene.

Nicholson v. Missouri Pacific R.R., *supra*, 366 I.C.C. at 69 n.2 (emphasis added). We find, in any event, that the clarity of the legal principles mandating our affirmance of the Commission's order obviates remand for purposes of intervention by these parties.

Next petitioner contends that the Commission's decision was improper because only two Commissioners of the three Commissioner Division assigned to consider his complaint participated in that decision—one Commissioner would have participated only in the event of a tie. *See id.* at 74. The simple response to this argument is that the Interstate Commerce Act provides that the Commission may carry out its duties in Divisions consisting of three Commissioners, 49 U.S.C. §§ 10302(a), 10305 (Supp. V 1981), and that a majority of

because section 10102(19) of the Interstate Commerce Act defines "*railroad*" to include "yard,"[8] the Act's requirement that Commission authorization be received prior to construction of "*railroad* lines" necessarily encompasses construction of "yards." Petitioner also argues that because the proposed classification yard will cost $75 million, the substantiality of the cost requires the Com-

---

a Division is a quorum for the transaction of business. *Id.* § 10306(a). Since a quorum of the assigned Division dismissed petitioner's complaint, its decision was valid. Northern Valley Transfer, Inc. v. ICC, 192 F. Supp. 600, 603 (D.N.J. 1961).

Finally, petitioner asserts that the decision was improper because the Commission was "politically imbalanced" at the time it was rendered; at that time the Commission consisted of three Republicans and one Democrat. However, petitioner concedes, as he must, that nothing in the Interstate Commerce Act requires a Division of the Commission to be politically balanced. Brief for Petitioner at 31. Thus petitioner can assert no injury as a result of the composition of the Commission since his complaint could have been assigned to a Division of the same Commissioners even if the Commission had consisted of a full contingent of eleven Commissioners, six from one party and five from the other. *See* 49 U.S.C. § 10301(b) (Supp. V 1981). Petitioner's real grievance with respect to the composition of the Commission lies with the President and the Senate, who failed to appoint and confirm additional Commissioners, and not with the validly appointed Commissioners who then composed the Commission. Assure Competitive Transp., Inc. v. United States, 629 F.2d 467, 474-75 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981). The Act authorizes those Commissioners to exercise the powers of the Commission irrespective of vacancies in the membership of the Commission. 49 U.S.C. § 10301(e) (Supp. V 1981).

[8] 49 U.S.C. § 10102(19) (Supp. V 1981) (emphasis added) provides:

> "railroad" includes—
>
> . . . .
>
> (C) a switch, spur, track, terminal, terminal facility, and freight depot, *yard*, and ground, used or necessary for transportation.

mission to rule upon the project prior to its construction. We find these arguments to be without merit.

It is well established that the determination of whether a particular track segment is a "railroad line," requiring Commission authorization pursuant to section 10901(a), or a "spur, industrial, team, switching, or side" track, exempt from Commission jurisdiction pursuant to section 10907(b),[9] turns on the intended use of the track segment, not on the label or cost of the segment. It was held early on that

> it is sufficiently plain, from a consideration of not only the obvious purpose prompting the [Interstate Commerce Act[10]] but also of the general nature of the tracks mentioned, that Congress intended *to subject to the requirements of [section 1(18)]* so-called main or branch lines of railroad, that is, *lines designed and used for continuous transportation*

---

[9] Congress first codified the provisions of the Interstate Commerce Act in 1978. Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. Prior to that time the provisions of sections 10901 and 10907 were found at section 1(18) of the Act. Insofar as is relevant to this case, the codification made no substantive changes in these provisions. *See* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319 n.7 (1981).

[10] The court indicated that the purpose of Congress in enacting the Interstate Commerce Act was,

> as was pointed out by Interstate Commerce Commissioner Clark while speaking before the Committee on Interstate and Foreign Commerce of the House of Representatives, . . . "to prevent the building of duplicate lines of railroad because of keen rivalry of certain financial interests, or when the railroads so built will not serve the present or future convenience and necessity, and will simply depend for traffic upon that which they can get away from railroads already built, adding to the total burden of maintenance, capital returns, etc., which the public must pay."

Detroit & M. Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 545 (E.D. Mich. 1923).

> *service by through, full trains between different points of shipment or travel, and to exclude* from the operation of the statute *all that mass of "tracks"* (as distinguished from "lines") naturally and necessarily *designed and used for* loading, unloading, *switching*, and other *purposes connected with, and incidental to*, but not actually and directly used for, *such transportation service.*

Detroit & M. Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 546 (E.D. Mich. 1923) (emphasis added).[11] Shortly thereafter, the Supreme Court held that

> [i]*f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad* within the meaning of [section 1(18) of the Act], although the line be short and although the character of the service contemplated be that commonly rendered . . . by means of spurs or industrial tracks.

Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., 270 U.S. 266, 278 (1926) (emphasis added). Thus it can be seen that track segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the Commission pursuant to section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between points of

---

[11] *Accord* New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 165-66 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) (emphasis added) ("If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a 'line of railroad, or extension thereof . . . .' If, however, the trackage is used in the loading, reloading, storage and switching of cars *incidental* to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is 'spur, industrial, team, switching or side tracks' and as such, not under Commission jurisdiction").

shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b).[12]

Application of these principles to Missouri Pacific's proposed classification yard compels the conclusion that construction of the Pointe Coupee Classification Yard is not the construction of a "railroad line" requiring Commission approval pursuant to section 10901(a). The yard will be located adjacent to Missouri Pacific's existing main-line track in Pointe Coupee Parish and will be used solely for storage, *switching*, and classification of railroad cars. Although the classification yard is expected to increase Missouri Pacific's efficiency in handling freight traffic, the yard will not extend Missouri Pacific's service into any new territory. Through trains will continue to move over Missouri Pacific's existing main-line track to their prior destinations; the classification yard will be *incidental* to the operation of trains over that track. Accordingly, construction of the classification yard is exempted from Commission jurisdiction by section 10907(b).

Support for this conclusion is found in a decision of the Fifth Circuit which held, without explanation, that Commission approval pursuant to section 1(18) of the

---

[12] That a track segment is or is not identified as a "spur, industrial, team, switching, or side" track is not determinative or whether it is exempted by section 10907(b) from Commission jurisdiction. *See, e.g.*, Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., *supra*, 270 U.S. at 274-79 (track segment identified as "industrial" track held to require Commission approval pursuant to section 1(18)); New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 165-66 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) (track segment identified as "side" track held to require Commission approval pursuant to section 1(18)); Georgia S. & Fla. Ry. v. Du al Connecting R.R., 324 F.2d 801, 802 (5th Cir. 1963) (per curiam) (track segment identified as "yard" track held not to require Commission approval pursuant to section 1(18)).

Interstate Commerce Act [13] was not required prior to the construction of a classification yard. *Georgia S. & Fla. Ry. v. Duval Connecting R.R.*, 324 F.2d 801, 802 (5th Cir. 1963) (per curiam). Furthermore, the Commission has consistently interpreted the Act as not requiring its approval prior to the construction of yards:

> The applicant correctly states that the construction of a *new yard* and the consolidation of terminal facilities *are not within themselves subject to the jurisdiction of this Commission* and may be accomplished without its authority.

Oregon-Washington R.R. & Navigation Co. Construction, 275 I.C.C. 591, 598 (1950) (emphasis added). *Accord Terminal Ry. Ala. State Docks—Operation, Mobile, Ala.*, 354 I.C.C. 747, 749 (1978); *Boston Terminal Co. Reorganization*, 312 I.C.C. 373, 378 (1960).

Petitioner's arguments do not require a contrary result. The fact that the Interstate Commerce Act defines "railroad" to include "yard" does not support an interpretation that the phrase "railroad line" includes switching yards. There is a distinction in the statute between "railroad" and "railroad line." *See Long Island R.R. v. New York C.R.R.*, 281 F.2d 379, 382-83 (2d Cir. 1960).[14] Petitioner's reasoning simply ignores the significance of the term "line" in the phrase "railroad line," as well as sixty years of judicial and Commission interpretation of that phrase. Furthermore, nothing in the Act requires Commission authorization of railroad construction projects solely because such projects are costly.[15] It is the

---

[13] *See* note 9 *supra*.

[14] *See also* note 12 *supra*.

[15] *Cf.* 49 U.S.C. § 11301 (Supp. V 1981) (Commission approval required prior to issuance of certain securities by railroads; Commission required to investigate intended use of proceeds from sale of such securities prior to approval).

purpose, and not the cost, of such projects which determines whether Commission approval is required.

Petitioner contends that his position is supported by several Supreme Court decisions, but we find this reliance to be misplaced. The opinion by Chief Justice Taft in *Railroad Commission v. Southern Pacific Co.*, 264 U.S. 320 (1924), comes the closest to discussing the point at issue, but it is distinguishable on its facts. In *Southern Pacific* the Court held that the Commission was required to give its approval before the City of Los Angeles could require three national railroads to replace their existing passenger stations with a single union station. *Id.* at 347. The plan for the new union station required the three railroads to make substantial *extensions* to their main-line tracks, which, while not great in distance, would "involve a new intramural destination for each railway with important changes in the handling of interstate traffic and passengers" and great expense to change the routes of "the *main tracks* in a crowded city." *Id.* at 346 (emphasis added). These substantial changes necessarily involved the abandonment by the three railroads of the main-line tracks that previously served their old depots and the *extension* of their main lines to the new terminal as ordered by the California State Railroad Commission at the request of the City of Los Angeles.

The project considered by the Court in *Southern Pacific* is clearly distinguishable from the Pointe Coupee Classification Yard because, as the Commission found, "the proposed [classification] yard is *not a line of railroad or an extension of a line* within the meaning of section 10901, since the operations to be performed at the yard are incidental to line-haul transportation." *Nicholson v. Missouri Pacific R.R.*, *supra*, 366 I.C.C. at 74 (emphasis added) (footnote omitted). This factual description of the classification yard leaves the Commission without jurisdiction over the proposed construction. *See* 49 U.S.C. §§ 10901(a), 10907(b)(1) (Supp. V 1981). The absence

of any change in, or *extension* of Missouri Pacific's main-line track, distinguishes its classification yard project from the union station project and associated new main lines that required Commission approval in *Southern Pacific.*[16]

III.

Missouri Pacific's proposed classification yard will be *incidental* to the operation of its existing main-line track

---

[16] The other cases upon which petitioner relies are similarly inapposite and do not require a different result than we reach: L. Singer & Sons v. Union Pacific R.R., 311 U.S. 295, 303-04 (1940) (interest of merchant at market in Kansas City, Missouri was not sufficiently affected to give him right to enjoin construction of an extension of track by the Union Pacific Railroad to a new competing market in Kansas City, Kansas where such extension did not constitute a material change in the railroad's transportation system); Texas v. United States, 292 U.S. 522, 528-35 (1934) (Commission was empowered under the Emergency Railroad Transportation Act of 1933, in the interest of economy, to authorize lease of one interstate railway to another and to permit lessee to abandon or remove the general offices and shops of lessor even though such abandonment or removal was prohibited by the law of the state of lessor's incorporation in which such offices and shops were located); Piedmont & N. Ry. v. ICC, 286 U.S. 299, 303-05, 308-12 (1932) (electric line carrier that proposed to build two *extensions* of 53 and 73 miles respectively was not exempt from the requirement of obtaining a certificate of public convenience and necessity for such construction as a "street, suburban, or interurban electric railway" under section 1(22) of the Interstate Commerce Act where its track on city streets was only 2.9 miles—2.25 percent of its total track—and its business was pre-eminently interchange, interstate freight traffic of national character in all respects conducted the same as the business of steam freight carriers in the territory served); Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., *supra*, 270 U.S. at 276-79 (*see* discussion at p. 8 *supra*; new 7.5 mile track intended to serve *new territory* currently being served by a competitor constitutes an *extension* of railroad within the meaning of the Transportation Act of 1920, and is not a spur or industrial track).

that runs through Pointe Coupee Parish, Louisiana. It does not involve any change in or extension of its main-line track and it qualifies as "switching" tracks that are specifically excluded by section 10907(b)(1) from the authority of the Commission under section 10901(a). Accordingly, the provisions of section 10901(a) do not require that Missouri Pacific obtain Commission authorization in order to construct said yard. The decision of the Commission so holding and dismissing petitioner's complaint against Missouri Pacific is therefore affirmed.

Judgment accordingly.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29657

JERRY K. NICHOLSON, NICK H. BRUCKERHOFF, OLIVER MAJOR AND HALLOWAY PLANTING CO. v. MISSOURI PACIFIC RAILROAD COMPANY

Decided February 11, 1982

The construction of a classification yard is exempt from Commission regulation pursuant to 49 U.S.C. 10907(b)(1). Complaint dismissed.

Fritz R. Kahn, John R. Long, and *Thomas E. Acey, Jr.,* for complainants.

William R. McDowell, R. H. Stahlheber, and *John P. Legendre* for defendants.

Louis D. Curet, John J. Rademacher, and *Larry LeJeune* for intervenors.

DECISION

By the Division:

In a decision served September 15, 1981, Review Board Number 3 dismissed as premature a complaint alleging that the Missouri Pacific Railroad Company (MoPac) had violated 49 U.S.C. 10901 by constructing a line of railroad without Commission approval. A joint appeal was filed by complainants[1] and petitions for leave to intervene were filed by

---

[1] Jerry K. Nicholson, Nick H. Bruckerhoff, Oliver Major, and Halloway Planting Co.

several parties.[2] We are denying the joint appeal and affirming the previous decision on different grounds.

FACTS

Complainants are owners of certain tracts of land located near Livonia, in Pointe Coupee Parish, LA, over which MoPac owns a right-of-way for the operation of a single-line track of railroad. Complainants allege that MoPac seeks to expropriate portions of their property to construct a classification yard. The yard will be approximately 19,217 feet long and 2,000 feet wide, and will be located along one side of, and adjacent to, the main line of MoPac's Alexandria subdivision. It will be built on 555.625 acres in a rural, agricultural area.

To obtain the land needed for the classification facility, MoPac has filed an eminent domain civil action in Pointe Coupee Parish. Complainants urge that MoPac has never sought nor received a determination by this Commission under 49 U.S. 10901 authorizing the proposed construction. They argue that section 10901 expressly includes a yard as being embraced within the meaning of the term "railroad line" as used in section 10901,[3] and point to 49 U.S.C. 10102(19)(C)

---

[2] The Louisiana Soybean Association, the American Farm Bureau Federation, and the Louisiana Farm Bureau Federation request intervention to present testimony if the Commission holds a hearing on whether destruction of agricultural land to build a classification yard is warranted. Because of our ultimate decision dismissing the complaint, no purpose would be served in permitting these parties to intervene. Accordingly, the requests are denied.

[3] Section 10901(a) reads, as follows:

A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

which defines a "railroad" as including "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." Their conclusion is that section 10901 expressly requires MoPac authorization from this Commission prior to the prosecution of an eminent domain proceeding.

The board dismissed the complaint on the grounds that it was premature. The board stated that an application is ripe for Commission review when there is either a binding agreement between the parties to a transaction for which Commission approval is necessary or when there is a situation where a party is ready and able to take an action requiring Commission approval. See *Magner-O'Hara Scenic Railway-Operation-In the State of Michigan* (not printed) decided May 6, 1981. The board found that before MoPac can begin to construct its proposed classification yard on complainants' land, it must first be victorious in the pending civil action. Because a civil decision against MoPac may moot the issue of whether Commission approval of the construction is required, the board concluded that the complaint was premature and dismissed it.

DISCUSSION AND CONCLUSIONS

Section 10901 provides that a rail carrier can "construct an extension to any of its railroad lines," or "construct an additional railroad line," only if the Commission certifies that the present or future public convenience and necessity require or permit the construction. MoPac has neither sought nor obtained Commission certification of its project. Accordingly, the only issues before us are (1) whether "construction" within the meaning of section 10901 has occurred; and (2) if so,

---

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

whether it involves construction of "an extension to" or an "additional railroad line."

Construction.—The board found that the bringing of a condemnation proceeding does not constitute "construction" within the meaning of section 10901. We cannot agree.

First, the board's finding would effectively deprive complainants of a forum in which to determine our jurisdiction over the proposed project. As demonstrated by complainants, Commission approval of a proposed construction must be obtained far enough in advance of a railroad's commitment so that the Commission will have time to review and evaluate the operational, financial, and environmental effects of the proposal. Here, MoPac has clearly stated its belief that no Commission approval is required and it is apparent that MoPac intends to commence construction as soon as the land is condemned. Accordingly, if we do not take jurisdiction now, construction would begin and complainants' property confiscated and damaged before we could determine whether the project was within our jurisdiction and if so, whether it should be approved. Failure to review the matter prior to the condemnation of complainants' land would be particularly unfair since complainants have no other forum in which to raise this issue. See 49 U.S.C. 11701(b). It is clearly appropriate to examine the merits of the complaint.

Second, the board's decision is contrary to the only decision directly on point. In *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F.2d 387 (5th Cir. 1969), a railroad had begun condemnation proceedings in state court to obtain right of way for a proposed extension. No Commission approval had been obtained, so a competing railroad filed suit in Federal district court to enjoin the State court proceeding. The court enjoined proceedings to prevent violation of Federal law which would otherwise occur, finding that:

> [t]here appears to be no serious question that an attempt to condemn lands for the purposes of constructing new trackage thereon without first acquiring a certificate from

> the Interstate Commerce Commission constitutes "construction" within the meaning of this statute.

418 F.2d at 393. See also *Gilmore* v. *Sandersville R. Co.*, 149 F. Supp. 725 (M.D. Ga 1955); *Smyth* v. *Asphalt Bell Ry. Co.*, 12 F.2d 14 (5th Cir. 1926). We agree with the court in *Tampa Phosphate* that the condemnation of right-of-way to construct a railroad line is "construction" which triggers the approval requirements of 49 U.S.C. 10901.

The board cited *Magner-O'Hara Scenic Railway-Operation-In the State of Michigan*, served February 4, 1980, July 22, 1980, and May 12, 1981 (not printed) in support of its finding that the complaint should be dismissed as premature. There division 1 dismissed an application for authority to operate a passenger rail service because the service required trackage rights over another carrier which that carrier refused to grant and which, even if they could be obtained, would require additional Commission approval.[4] *Magner-O'Hara* is not determinative here for two reasons. First, under *Tampa Phosphate*, the condemnation proceeding itself is "construction" within the meaning of section 10901; this condemnation proceeding, if begun to construct a railroad line, is itself a violation of the section. Second, failure of the Commission to take action has a substantially different impact here than *Magner-O'Hara*. In that case, no operations could begin—and no party could be harmed—until successful negotiation of and approval of a trackage rights agreement. Here, complainants have shown a substantial probability that if the Commission waits, complainant would be harmed by the challenged conduct before the Commission could determine its legality.

In sum, the bringing of a condemnation proceeding constitutes "construction," and we will review the merits of the complaint.

---

[4] A subsequent decision found the entire proposed operation to be outside our jurisdiction.

Railroad line.—The complaint alleges that MoPac is violating the act by constructing an addition to or extension of railroad line without prior Commission approval. MoPac's proposed classification yard is described in the record. The sole question before us, then, is whether construction of this yard might be considered the construction of a "railroad line."

The term "railroad line" is not defined in the act,[5] nor is the legislative history useful in resolving the issue. However, a separate section of the act excludes from the requirements of section 10901—again without further explanation—all "spur, industrial, team, switching and side track located, or intended to be located, entirely in one State." 49 U.S.C. 10907(b). Accordingly, we must look to case law and to common sense to determine whether a proposed classification yard could qualify as a rail line.

At the outset, we note that there are a large number of classification yards in this country, and many have been built since 1920 (when we obtained authority over the construction of railroad lines).[6] Yet complainants have cited, and we have found, no instance in which the Commission has found that the construction of a classification yard—or of any other yard—to require Commission approval under section 10901 or its predecessor, section 1(18) of the Interstate Commerce Act.

---

[5] Complainants argued before the board that "railroad line" must include a classification yard because "railroad" is defined to include "a switch, spur, track, terminal facility, and a freight yard depot, yard, and ground used or necessary for transportation." 49 U.S.C. 10102(19)(C). This argument does not withstand scrutiny; it would imply, for example, that a carrier needs our approval before acquiring "ground" to be used to construct a communications facility. A railroad clearly requires some property that cannot be considered a "railroad line." We must look beyond the definition of "railroad" to define "railroad line."

[6] See, *e.g.*, the *Railway Age* article cited by complainants in their reply to defendant's motion to dismiss (p. 6).

We need not look far to explain why this issue arises so rarely: in the few instances in which it has been raised, yard track has been found clearly exempt. In *Georgia Southern and Florida Ry.* v. *Duval Connecting R.R.*, 324 F.2d 801 (5th Cir. 1963) the court held that construction of a classification yard similar to the yard proposed here was switching track which did not require Commission approval. Similarly, in *Terminal Ry. Ala State Docks—Operation, Mobile, AL*, 354 I.C.C. 747, 749 (1978), division 1 found exempt "certain rail yard properties," which were to be used as "a switching yard and to furnish connection terminal switching." Again, in *Florida E. C. Ry. Co. Petition for Declaratory Order*, 360 I.C.C. 272 (1979), the Commission observed that by contrast [to trackage which is a portion of a railroad line] trackage exempted under former section 1a(a) is characterized by its use "in the loading, reloading, storage, and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee." Cf. *Sioux City Term. Ry. Switching*, 241 I.C.C. 53, 90 (1940).

Complainants cite *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966) as holding that trackage should be considered an addition or extension of railroad line if it is an essential part of a continuous through journey in interstate commerce and not merely incidental to a line-haul movement.[7] They urge that the proposed classification yard is to be used as part of the actual transportation haul from shipper to consignee, not merely as incidental to a line haul movement and they rely upon testimony submitted by MoPac indicating that its new yard would enable it to expand its markets and to serve additional shippers.

Complainants' reliance on *New Orleans Terminal Co.* is misplaced. The court there reviewed not yard trackage, but a

---

[7] The court there said: "[I]f there are traffic movements which are part of the actual transportation haul from shipper to consignee then the trackage over which the movement takes place is a line of railroad, or any extension thereof." 366 F.2d at 165-66.

side track which was used for the passage of through trains. By contrast, the proposed classification yard is and can be used only for storage, switching, and classification. The transportation will continue to move over MoPac's existing main line. No shippers are located in the vicinity of the yard or will be directly served from the yard. No lines of any other carrier will reach the yard, so it cannot serve as a connecting track between two carriers. Compare *Duluth, S.S. & A.R. Co.* v. *Chicago, M., St. P. & P.R. Co.*, 307 I.C.C. 311 (1959). MoPac clearly believes that the yard will allow it to provide more extensive and efficient service over its existing rail lines and may permit it to capture additional traffic. However, we are convinced that the proposed yard is not a line of railroad or an extension of a line within the meaning of section 10901, since the operations to be performed at the yard are incidental to line-haul transportation.[5]

We conclude that complainants' appeal, except as discussed above, is without merit and should be denied. The board's dismissal of the complaint is affirmed on the ground that we have no jurisdiction over the proposed construction.

This decision will not significantly affect the quality of the human environment or the consumption of energy.

It is ordered.

1. The petitions for leave to intervene filed by the Louisiana Soybean Association, the American Farm Bureau

---

[5] Complainants appear to argue that the Commission should have jurisdiction over the construction because it is a significant financial undertaking requiring from 40 to $60 million. Congress did not, however, give us jurisdiction over every railroad expenditure. Our jurisdiction over construction is limited to additions to or extensions of railroad lines, which generally occurs when a construction permits a carrier to penetrate a new market. See generally *Texas & P. Ry. Co.* v. *Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266 (1926). *Chicago Great Western Ry Co.* v. *Illinois Central Gulf R. Co.*, 275 F. Supp. 909 (1967).

Federation, and the Louisiana Farm Bureau Federation are denied.

2. The complainants' administrative appeal, except as discussed in the decision, is denied.

3. The prior decision of Review Board No. 3 is affirmed.

4. This decision shall be effective when it is served.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Clapp, Gresham and Taylor. Commissioner Taylor is assigned to this division for the purpose of resolving tie votes. Since there was no tie in this matter, Commissioner Taylor did not participate.

AGATHA L. MERGENOVICH,
Secretary

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29657

JERRY K. NICHOLSON, NICK H. BRUCKERHOFF, OLIVER MAJOR AND HALLOWAY PLANTING CO. v. MISSOURI PACIFIC RAILROAD COMPANY

Decided August 28, 1981

On May 22, 1981, a complaint against the Missouri Pacific Railroad Company (MoPac) was filed by Jerry K. Nicholson. The complaint was brought under 49 U.S.C. § 11701 and the Commission's Rules, specifically 49 CFR 1100.26, and alleges a violation of 49 U.S.C. § 10901. On June 3, 1981, the complaint was supplemented to include three additional plaintiffs, Nick H. Bruckerhoff, Oliver Major, and Halloway Planting Co. On July 23, 1981, MoPac moved to dismiss plaintiff's complaint and supplemental complaint. Plaintiffs filed a reply.

Complainants allege that they are the owners of certain tracts of land located near Livonia in Pointe Coupee Parish, LA, over which MoPac, a rail carrier providing transportation subject to the jurisdiction of this Commission, owns a right-of-way for the operation of a single line track of railroad.

Complainants state that MoPac seeks to expropriate portions of their property to construct a new railroad yard facility and related facilities and appurtenances. To effect this acquisition MoPac has filed and is prosecuting a judicial action in the 18th Judicial District Court for the Parish of Pointe Coupee, State of Louisiana, Civil Action No. 17299, Division B, *Missouri Pacific Railroad Company* v. *Jerry K. Nicholson, Elizabeth Nicholson Fischer and James W. Smither III, as Trus-*

tees of the Leonard K. Nicholson Trust; El Tres Petroleum Corporation; and Nick H. Bruckeroff.

Complainants allege that MoPac has never sought nor received a necessary determination by this Commission under 49 U.S.C. § 10901 that the public convenience and necessity permit or require the proposed construction. Complainants accordingly request that MoPac be ordered to cease and desist from taking any further action to construct or to prepare for construction any additional rail lines over the property of complainants.

MoPac states that the proposed new railroad facility is a classification yard that will not serve any new shippers or extend the existing line of railroad into any new territory. MoPac urges that the Commission has never held that a classification yard is a railroad line or a line of railroad, or that Commission approval is required for the construction of a classification yard. MoPac accordingly urges dismissal of the complaint and supplemental complaint.

We believe that the complaint should be dismissed but for a different reason than that advanced by MoPac. An application is ripe for Commission review when there is either a binding agreement reached between the parties to a transaction for which Commission approval is necessary or when there is a situation where a party is *ready* and *able* to undertake an action for which Commission approval is required. *Magner-O'Hara Scenic Railway—Operation,—In the State of Michigan*, decisions served February 4, 1980, July 22, 1980, and May 12, 1981 (not printed).

Here, MoPac would like to construct its proposed classification yard on complainants' land but it first must be victorious in a pending and contested civil action. A trial has been set for January, 1982, and indeed a decision (especially if appealed) may be a long way off. A civil decision against MoPac may totally moot the issue of whether Commission approval of

MoPac's construction is required. Accordingly, we believe the complaint is premature.

It is ordered:

1. The complaint and supplemental complaint are dismissed.

2. This decision is effective on the date of service.

By the Commission, Review Board Number 3, Members Krock, Joyce, and Dowell.

AGATHA L. MERGENOVICH,
Secretary

(SEAL)

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 82-1428

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

LOUISIANA SOYBEAN ASSOCIATION,
MISSOURI PACIFIC RAILROAD COMPANY,

Intervenors,

Petition For Review Of An Order Of The Interstate Commerce Commission

Before: Robinson, Chief Judge, Wald, Circuit Judge, and MacKinnon, Senior Circuit Judge

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Interstate Commerce Commission, and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the order of the Interstate Commerce Commissioin under review

herein is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 30 1983

GEORGE A. FISHER
CLERK

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 30, 1983.
Opinion for the Court filed by Senior Circuit Judge Mackinnon.

Office - Supreme Court, U.S.
FILED
DEC 7 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-533

In the Supreme Court of the United States

OCTOBER TERM, 1983

JERRY K. NICHOLSON, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN BROADLEY
General Counsel

ELLEN D. HANSON
Associate General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney

Interstate Commerce Commission
Washington, D.C. 20423

QUESTION PRESENTED

Whether the construction of a railroad classification yard requires Commission approval under 49 U.S.C. (Supp. V) 10901(a).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Bayside Enterprises, Inc. v. *NLRB*, 429 U.S. 298 4

Chicago Great Western Ry. v. *Illinois Central R.R.*, 275 F. Supp. 909 6

Detroit & M. Ry. v. *Boyne City, G. & A. R.R.*, 286 F. 540 ..... 6, 8

Georgia S. & Fla. Ry. v. *Duval Connecting R.R.*, 324 F.2d 801 8

Long Island R.R. v. *New York Central R.R.*, 281 F.2d 379 ..... 5, 7

New Orleans Terminal Co. v. *Spencer*, 366 F.2d 160 8

New York Dock Ry. v. *Pennsylvania R.R.*, 62 F.2d 1010 5

Oregon-Washington R.R. & Navigation Co. Construction, 275 I.C.C. 591 8

Railroad Comm'n v. *Southern Pacific*, 264 U.S. 331 ..... 6, 7

Page

Cases—Continued:

Terminal Ry. Alabama State Docks—Operation, 354 I.C.C. 747 8

Texas & Pac. Ry. v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. 266 ..... 4, 6, 7

United States v. *Chicago North Shore & M. R.R.*, 288 U.S. 1 7

Statutes:

Interstate Commerce Act, 49 U.S.C. (Supp. V) 10101 *et seq.*:

49 U.S.C. (Supp. V) 10102(19) 5

49 U.S.C. (Supp. V) 10505 7

49 U.S.C. (Supp. V) 10901 ..... 1, 2, 3, 5, 6, 7

49 U.S.C. (Supp. V) 10901(a) 4, 5

49 U.S.C. (Supp. V) 10907 ..... 5, 6, 7

49 U.S.C. (Supp. V) 10907(b) 4, 5

49 U.S.C. (Supp. V) 10907(b)(1) 2

49 U.S.C. (Supp. V) 11505 2

49 U.S.C. (Supp. V) 11702(a)(1) 2

49 U.S.C. (Supp. V) 11703(a) 2

49 U.S.C. (Supp. V) 11901(d) 2

49 U.S.C. 1(18) 1

49 U.S.C. 1(18)(d) 2

41 Stat. 477 1

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-533

JERRY K. NICHOLSON, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 711 F.2d 364. The Commission's final opinion (Pet. App. 14a-22a) is reported at 366 I.C.C. 69. The initial agency opinion (Pet. App. 23a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26a-27a) was entered on June 30, 1983. The petition for a writ of certiorari was filed on September 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 49 U.S.C. (Supp. V) 10901,[1] the Interstate Commerce Commission is authorized to determine whether

[1] Essentially the same provision formerly appeared in 49 U.S.C. 1(18), which was added to the Interstate Commerce Act by 41 Stat. 477 (Feb. 28, 1920).

the public convenience and necessity permits extensions of "railroad lines" operating in interstate commerce. Constructing a "railroad line" without first obtaining Commission certification is unlawful, and may be enjoined by a United States District Court in an action brought by the Commission, the United States, or an affected state. 49 U.S.C. (Supp. V) 11702(a)(1), 11703(a), 11505.[2] The Interstate Commerce Act (the Act), specifically excepts from the reach of Section 10901 the construction and operation of "spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State." 49 U.S.C. (Supp. V) 10907(b)(1).[3] Consequently, before the Commission can consider the merits of a proposed construction project, or before a district court may enjoin rail construction, it must first determine whether, based on the facts of record, the trackage at issue is subject to the certification requirement of the Act.

2. This proceeding involves the proposed construction by the Missouri Pacific Railroad Company (MoPac) of a classification yard approximately 19,217 feet long and 2,000 feet wide to be located adjacent to a MoPac main line in Louisiana. MoPac instituted an eminent domain proceeding in a Louisiana state court to take land belonging to petitioner and others that is necessary for the project (C.A. App. 4).[4]

---

[2]Moreover, any person knowingly authorizing, consenting to, or permitting a violation of the certification requirement is subject to a civil penalty of up to $5,000 (49 U.S.C. (Supp. V) 11901(d)).

[3]This provision was previously contained in 49 U.S.C. 1(18)(d). See note 1, *supra*.

[4]*Missouri Pac. R.R.* v. *Nicholson*, Civil Action No. 17299 (La. Dist. Ct. 1981). Judgment has been rendered for MoPac in that case, and Nicholson's appeal of that judgment is currently pending (MoPac Br. in Opp. 4).

3. Because MoPac had not requested Commission authorization for the construction, petitioner sought a cease and desist order from the Commission to prevent MoPac from constructing the yard.[5]

MoPac moved to dismiss the complaint, on the ground that its proposed classification yard was not a "railroad line" within the meaning of Section 10901 (C.A. App. 25-26). An employee review board dismissed the complaint as not ripe for Commission review (Pet. App. 23a-25a). On administrative appeal, the Commission found the complaint to be ripe, but affirmed the dismissal after concluding that the proposed classification yard was not a "railroad line" requiring Commission authorization under Section 10901 (Pet. App. 14a-22a).[6] In reaching this conclusion, the Commission emphasized that the operations to be performed at the yard would be merely incidental to line-haul transportation (*id.* at 21a). Thus, the yard track here would be used only to store, switch and classify cars; the line-haul transportation would continue over MoPac's existing main line. Moreover, no shippers are located in the vicinity or would be directly served from the yard, and no lines of any other carrier would reach the proposed yard to permit the connection of two carriers (*id.* at 20a-21a).[7]

---

[5]Nick H. Bruckerhoff, Oliver Major, and Halloway Planting Company joined petitioner in the complaint before the Commission (Pet. App. 23a). Although Halloway Planting Company originally joined petitioner in seeking reversal of the Commission decision before the court of appeals, it voluntarily withdrew before the court of appeals issued its decision.

[6]The Commission observed that it had never authorized the construction of a classification yard, although many such yards exist(Pet. App. 19a). And it noted that, in the few cases raising the issue, the courts and the Commission have found yard track to be exempt (*id.* at 20a).

[7]The Commission rejected the argument that it should examine the construction because substantial expenditures would be involved, explaining that its jurisdiction under Section 10901 is limited, and generally arises when the construction would permit a carrier to penetrate a new market (Pet. App. 21a n.8).

4. The court of appeals affirmed (Pet. App. 1a-13a) the agency's decision. The court found it to be well established that the distinction between a "railroad line" requiring Commission authorization under Section 10901(a), and "spur * * * switching, or side" track exempt under Section 10907(b), "turns on the intended use of the track segment, not on the label or cost of the segment" (Pet. App. 7a). Following the guiding principles enunciated by this Court in *Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. 266, 278 (1926), the court of appeals concluded (Pet. App. 8a-9a (footnote omitted)) that:

> track segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the Commission pursuant to section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b).

Applying these principles to this case the court held that MoPac's proposed construction of a classification yard was exempt from Commission jurisdiction (Pet. App. 9a).

ARGUMENT

Petitioner asks this Court to review the Commission's conclusion, based on its interpretation of the terms of its governing statute, that it had no jurisdiction to issue a certificate of public convenience and necessity for the construction of this classification yard. An agency's interpretation of the terms of its own jurisdictional statute is entitled to substantial deference (*Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 304 n.14 (1977)). Petitioner suggests nothing that would justify overturning that agency interpretation where, as here, it is consistent not only with the plain

language and purpose of the statute, but also with long-standing agency practice and judicial precedent. The court of appeals has carefully reviewed the agency's conclusion and affirmed it. There is no warrant for further review of this fact-bound case.

Although 49 U.S.C. (Supp. V) 10901(a) prohibits a rail carrier from constructing or extending a "railroad line" unless the Commission finds such construction consistent with the public convenience and necessity, Section 10907(b) exempts from this requirement the construction of "switching * * * tracks * * * to be located, entirely in one State." The trackage involved here is to be located entirely in Louisiana, and is to be used solely for classification of cars—*i.e.*, switching.[8] The yard operations will be incidental to line-haul transportation; through traffic will continue to use MoPac's existing main line, and the yard will not enable MoPac to serve any new territories or markets, connect with other carriers, or directly serve any new shippers. Applying the plain statutory language to these undisputed facts, the Commission (Pet. App. 21a) and the court of appeals (*id.* at 7a) correctly concluded that the proposed trackage was exempt as switching tracks.[9]

---

[8]Petitioner suggests (Pet. 11 n.9) that the proposed classification yard involves more than switching. The process of classifying cars, however, involves nothing more than arranging cars into a particular sequence by switching cars over switching track. A classification yard is thus simply a yard composed of switching tracks.

[9]Petitioner argues (Pet. 9) that, because the term "railroad" is defined at 49 U.S.C. (Supp. V) 10102(19) to include "yard," while the Section 10907 exemption does not include the word "yard" the Commission's construction approval authority over any "railroad line" in Section 10901 must include authority over a "yard," and a "yard" cannot be exempt under Section 10907. But that argument is based on the clearly erroneous assumption that the terms "railroad" and "railroad line" are equivalent. Cf. *Long Island R.R.* v. *New York Central R.R.*, 281 F.2d 379, 382-384 (2d Cir. 1960); *New York Dock Ry.* v. *Pennsylvania R.R.*, 62 F.2d 1010, 1012-1014 (3d Cir. 1933). "Ground" is also included in the

The statutory construction adopted by the Commission and the court of appeals in this case is consistent with the legislative intent evident in the Interstate Commerce Act's distinction in Sections 10901 and 10907 (and their predecessors) between trackage used in the movement of through traffic between the shipper and the consignee ("railroad line") and trackage used only incidentally for loading, unloading, storage and switching. See, *e.g., Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. 266 (1926). While Congress was concerned with major railroad expenditures, it did not confer upon the Commission jurisdiction to review all such expenditures, but only those involving construction of a new railroad line. See *Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry., supra; Chicago Great Western Ry.* v. *Illinois Central R.R.*, 275 F. Supp. 909 (1967). Expenditures, however large, that do not extend a carrier's lines, but are made simply to improve existing service, remain within the managerial discretion of the railroad.[10]

---

definition of "railroad" and is not mentioned in Section 10907. Accordingly, as the Commission noted (Pet. App. 19a n.5), petitioners' reasoning would lead to the absurd conclusion that a carrier needs Commission approval before acquiring ground to be used to construct a communication facility, which, of course, it does not. While the Commission has general regulatory jurisdiction over the operations of a "railroad," it does not have specific authority over all railroad construction under Section 10901—just that which produces a "railroad line."

[10]The cases cited by petitioner (Pet. 10-11) do not suggest that the financial cost of a project determines whether a "railroad line" is involved. Instead, those cases all clearly involved line extensions and applied the same standards used here.

In *Texas & Pac. Ry.*, Santa Fe sought to build track that extended into territory it had not previously served and that was already served by another carrier. *Railroad Comm'n* v. *Southern Pacific*, 264 U.S. 331 (1924), involved, inter alia, the substantial extension of main tracks. *Detroit & M. Ry.* v. *Boyne City, G. & A. R.R.*, 286 F. 540 (E.D. Mich. 1923) involved construction of track and institution of train service between new territory and points already served by another carrier.

Although the statutory provisions requiring Commission approval of railroad line construction and exempting switching track have been in existence for many years (see notes 1 & 3, *supra*), and classification yards are a longstanding incident of rail transportation, the Commission has never regulated the construction of classification yards. Such long-standing administrative inaction is, of course, due great weight. *United States* v. *Chicago North Shore & M. R.R.*, 288 U.S. 1 (1933); accord, *Long Island R.R.* v. *New York Central R.R.*, 281 F.2d 379 (2d Cir. 1960). It clearly reflects a general understanding, unchallenged until now, that classification yards are exempt.[11] Thus, the fact that there has never before been a specific ruling by the Commission or the courts that construction of classification yards is exempt does not make this a significant case requiring review by this Court.[12]

---

[11]Petitioners incorrectly contend (Pet. 6-13) that the court of appeals announced a new principle of federal law that allows the Commission, despite the certification requirements of Section 10901, to "deregulate" the construction of railroad classification yards without consideration of the criteria of 49 U.S.C. (Supp. V) 10505. But there has been no "deregulation," since such construction has never previously been regulated. Moreover, because Section 10907 deprives the Commission of jurisdiction over such construction, the Commission had no basis for exercising its discretionary power to deregulate under the general exemption provisions of Section 10505. This case involves an application of the specific, nondiscretionary exemption contained in Section 10907, not an evasion of the requirements of Section 10505.

Similarly, the arguments of amici that the Commission should have considered the need to protect agricultural land (Amicus American Farm Bureau Br. 10-11) and the value of historical landmarks on the condemned property (Amicus Louisiana Landmarks Society Br. 2-3) overlook the fact that Section 10907 leaves the Commission no jurisdiction to consider the construction at all. Cf. *Railroad Comm'n* v. *Southern Pacific*, 264 U.S. 331, 346 (1924) (cost of construction a factor to be considered when Section 10901 properly invoked).

[12]Nor does this case establish any new legal principle, as petitioner contends (Pet. 9, 12-13). Instead, it simply applies the principle, enunciated by this Court in 1926 in *Texas & Pac. Ry.* v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. at 278, that the proposed construction of "[t]racks * * * to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN BROADLEY
General Counsel

ELLEN D. HANSON
Associate General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney

Interstate Commerce Commission

DECEMBER 1983

---

improve the facilities required by shippers already served by the carrier or to supply the facilities of others * * * within the same territory and similarly situated * * * [presents questions that] depend[] largely upon local conditions which the state regulating body is peculiary fitted to appreciate." See also *Detroit & M. Ry.* v. *Boyne City, G. & A. R.R.*, 286 F. 540, 547 (E.D. Mich. 1923) (construction of tracks used in "the actual transportation haul from the shipper to the consignee" subject to federal regulation, while those used in "loading, reloading, storing, and switching the cars and other things merely incidental to the regular train haul" are exempt); *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160, 165-166 (5th Cir. 1966) (same); *Georgia S. & Fla. Ry.* v. *Duval Connecting R.R.*, 324 F.2d 801 (5th Cir. 1963) (construction of proposed classification and switching yard not subject to Commission approval); *Oregon-Washington R.R. & Navigation Co. Construction*, 275 I.C.C. 591, 598 (1950) (same); *Terminal Ry. Alabama State Docks—Operation*, 354 I.C.C. 747 (1978) (same).

DOJ-1983-12

Office-Supreme Court, U.S.
FILED
OCT 17 1983
ALEXANDER L. STEVAS
CLERK

No. 83-533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA;
LOUISIANA SOYBEAN ASSOCIATION; AND
MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF LOUISIANA SOYBEAN ASSOCIATION IN SUPPORT OF PETITION

Of Counsel:
VERNER, LIIPFERT, BERNHARD
AND MCPHERSON, CHARTERED
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036
(202) 452-7400

FRITZ R. KAHN
(Counsel of Record)
RUSSELL E. POMMER
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036
(202) 452-7484
Attorneys for Louisiana Soybean Association

Date: October 18, 1983

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

TABLE OF AUTHORITIES

CASES:	Page
Burke-Parsons-Bowlby Corp. v. *United States*, 268 F.Supp. 203 (S.D.W.Va.), *aff'd per curiam*, 389 U.S. 426 (1967)	4
Chesapeake & O. Ry. v. *United States*, 283 U.S. 35 (1931)	4
ICC v. *Railway Labor Executives Ass'n*, 315 U.S. 373 (1942)	5
Nebraska ex rel. Nebraska State Ry. Comm'n v. *United States*, 255 F.Supp. 718 (D. Neb. 1966)	5
Nicholson v. *Missouri Pacific R.R.*, 366 I.C.C. 69 (1982)	2
Texas & Pacific Ry. Abandonment, 363 I.C.C. 666 (1980)	4
STATUTES:	
Farmland Protection Policy Act, 95 Stat. 1341 (1981), codified at 7 U.S.C. §§ 4201 *et seq.* (1982)	2-4
49 U.S.C. § 10901(a) (Supp. V 1981)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-533

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA; LOUISIANA SOYBEAN ASSOCIATION; AND MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF LOUISIANA SOYBEAN ASSOCIATION IN SUPPORT OF PETITION

Respondent, Louisiana Soybean Association ("Association"), respectfully urges this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, as requested in the September 28, 1983, petition filed by Jerry K. Nicholson ("Nicholson").[1] In supporting Nicholson's petition for a writ of certiorari, Louisiana Soybean Association relies upon and adopts by reference the explanation and reason-

[1] This filing is made in accordance with Rule 19.6 of the Rules of this Court.

ing expressed therein (including the question presented, the statement of jurisdiction, the statement of the case, and the reasons for granting the writ). The Association shall provide herein a supplementary statement, in support of its position that this Court should grant certiorari because a matter of national importance is involved.

Louisiana Soybean Association is a nonprofit association of soybean growers, dedicated to the promotion of the production and marketing of soybeans in the State of Louisiana.[2] The Association's membership base is broad; at the present time there are over 550 members, representing more than one-half million acres of farmland under cultivation. The outcome of the case at bar is of vital interest to the Association because the sizable railroad classification yard proposed by Missouri Pacific Railroad Company ("Missouri Pacific") is to be built on farmland used to grow soybeans as well as other crops.[3] If the railroad facility is completed as planned, the land on which it is built no longer will be usable for soybean production purposes.

In addition to issuing a writ of certiorari for the reasons stated in Nicholson's petition, the Court should issue said writ because this case affects a matter of national importance—the preservation of the nation's farmlands. The conversion of productive farmlands to nonagricultural uses has been a serious national problem, as the Congress has recognized. Thus, in enacting the Farmland

---

[2] There are no parent companies, subsidiaries or affiliates of the Association (*see* Rule 28.1).

[3] Accordingly, Louisiana Soybean Association requested (but was denied) leave to intervene in the Interstate Commerce Commission proceeding (*see Nicholson* v. *Missouri Pacific R.R.*, 366 I.C.C. 69 n. 2 (1982)), and intervened in the review proceeding at the court of appeals.

Protection Policy Act, 95 Stat. 1341 (1981), codified at 7 U.S.C. §§ 4201 *et seq.* (1982), the Congress found both the existence of the problem and the need for Federal agencies to take corrective measures where possible:

(a) Congress finds that—

(1) the Nation's farmland is *a unique natural resource* and provides food and fiber necessary for the continued welfare of the people of the United States;

(2) each year, *a large amount of the Nation's farmland is irrevocably converted from actual or potential agricultural use to nonagricultural use;*

(3) continued decrease in the Nation's farmland base *may threaten the ability of the United States to produce food and fiber in sufficient quantities* to meet domestic needs and the demands of our export markets;

(4) the extensive use of farmland for nonagricultural purposes *undermines the economic base of many rural areas;*

(5) Federal actions, in many cases, result in the conversion of farmland to nonagricultural uses where alternative actions would be preferred;

(6) the Department of Agriculture is the agency primarily responsible for the implementation of Federal policy with respect to United States farmland, assuring the maintenance of the agricultural production capacity of the United States, and has the personnel and other resources needed to implement national farmland protection policy; and

(7) the Department of Agriculture and other Federal agencies *should take steps to assure that the actions of the Federal Government do not cause United States farmland to be irreversibly converted to nonagricultural uses in cases in which other national interests do not override the importance of the*

> *protection of farmland nor otherwise outweigh the benefits of maintaining farmland resources.*

7 U.S.C. § 4201(a) (emphasis added).

Even if the action of the Interstate Commerce Commission ("ICC") in disclaiming jurisdiction over Missouri Pacific's railroad yard construction technically is not subject to the proscriptions and prophylactic measures of the Farmland Protection Policy Act, the existence of a Congressionally-recognized farmlands problem is a strong reason for the Court to grant certiorari. Construction of the classification yard necessarily will result in farmland reduction in Louisiana, an area of the country (the South) where industrialization and resulting farmland conversion are acute.

The ICC should have exercised jurisdiction over Missouri Pacific's railroad yard construction (*see* Nicholson's Petition for a Writ of Certiorari) and considered the destruction of productive farmland in its "public convenience and necessity" evaluation under 49 U.S.C. § 10901(a) (Supp. V 1981).[4] That evaluation involves the balancing of a wide variety of factors. *See Texas & Pacific Ry. Abandonment*, 363 I.C.C. 666, 676-77 (1980).[5]

---

[4] In seeking intervention below, Louisiana Soybean Association urged the ICC to take evidence on this subject. The Association has not taken a position on whether, after all pertinent factors are considered, "the public convenience and necessity requires or permits" the construction of the Missouri Pacific Railroad classification yard, within the meaning of 49 U.S.C. § 10901(a).

[5] "There is no specification of the considerations by which the Commission is to be governed" in making a public convenience and necessity determination. *Chesapeake & O. Ry.* v. *United States*, 283 U.S. 35, 42 (1931). The scope of the ICC's authority in making that determination is broad. *Burke-Parsons-Bowlby Corp.* v. *United States*, 268 F.Supp. 203, 205 (S.D.W.Va.), *aff'd per curiam*, 389 U.S. 426 (1967).

Additionally, the "public convenience and necessity" terminology "import[s] inclusion of the 'general public' as contrasted with any specific individual." *Nebraska ex rel. Nebraska State Ry. Comm'n* v. *United States*, 255 F.Supp. 718, 722 (D. Neb. 1966). Moreover, national interests—not just the interests of an immediate locality and/or population—may be considered. *See ICC* v. *Railway Labor Executives Ass'n*, 315 U.S. 373, 377 (1942). This broad scope of the "public convenience and necessity" phrase includes the destruction of farmland in Louisiana that will result when Missouri Pacific's railroad classification yard is built.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the referenced petition for a writ of certiorari, the Court should issue said writ.

Respectfully submitted,

FRITZ R. KAHN
(Counsel of Record)
RUSSELL E. POMMER
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036
(202) 452-7484
Attorneys for Louisiana Soybean Association

Of Counsel:
VERNER, LIIPFERT, BERNHARD AND MCPHERSON, CHARTERED
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036
(202) 452-7400

Date: October 18, 1983

Office-Supreme Court, U.S.
FILED
OCT 29 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA;
LOUISIANA SOYBEAN ASSOCIATION; AND
MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION

Of Counsel:
F. W. READ, III
ROBERT B. BATCHELDER
1416 Dodge Street
Omaha, Nebraska 68179

SCOTT R. CRAIG
505 North Industrial
Boulevard
Dallas, Texas 75207

JOHN P. LEGENDRE
(Counsel of Record)
505 North Industrial
Boulevard
Dallas, Texas 75207
(214) 760-3052

Attorney for Respondent
MISSOURI PACIFIC
RAILROAD COMPANY

Date: OCT 27 1983

QUESTION PRESENTED

Whether tracks to be built for Respondent Missouri Pacific Railroad Company's switching yard, which will be built adjacent to Respondent's pre-existing line, will be used only for storage, switching, and classification of rail cars, and will be merely incidental to line-haul transportation and will *not* directly serve any rail customer, or extend into new territory, or be used as a part of the actual line-haul transportation from shipper to receiver, or invade the territory of another railroad, fall within the "switching, or side tracks" exception from ICC regulation under 49 U.S.C. 10907(b)(1 and do not constitute an "extension to any of its railroad lines" or an "additional railroad line" for which prior authorization by the ICC is required under section 10901(a).

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case in this Court.

Respondent Missouri Pacific Railroad Company is a subsidiary of Union Pacific Corporation. The following companies are also subsidiaries of Union Pacific Corporation and are thus affiliates of Missouri Pacific Railroad Company: Union Pacific Railroad Company, Champlin Petroleum Company, Rocky Mountain Energy Company, and Upland Industries Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
THERE ARE NO VALID REASONS FOR GRANTING A WRIT	7
I. The Tracks To Be Built For The Switching Yard Have None Of The Hallmarks Of "Railroad Lines" And Are Clearly "Switching, Or Side Tracks" Excepted From ICC Regulation Under Section 10907(b)	7
II. The Decision Below Is Squarely In Line With The Administrative And Judicial Principles And Decisions That Have Been Followed For Over Sixty Years	12
III. The Decision Below Is Not A *Sub Rosa* Attempt To Deregulate, But Is Simply A Reaffirmance That For Over Sixty Years, Section 10907(b) And Its Predecessor Have Excepted From ICC Regulation "Switching, Or Side Tracks"	15
CONCLUSION	15
CERTIFICATE OF SERVICE	16
APPENDICES	
A. Decision Of The United States Court Of Appeals For The District Of Columbia Circuit In No. 82-1428, Decided June 30, 1983	1a
B. Decision Of The Interstate Commerce Commission In Finance Docket No. 29557, Decided February 11, 1982	14a

Page

C. Decision Of The Interstate Commerce Commission Review Board No. 3 In Finance Docket No. 29657, Decided August 28, 1981 ... 23a

D. Judgment Of The United States Court Of Appeals For The District Of Columbia Circuit In No. 82-1428, Dated June 30, 1983 .. 26a

TABLE OF AUTHORITIES

CASES:

Boston Terminal Co. Reorganization, 312 I.C.C. 373, 378 (1960) 13

Detroit & Mackinac Railway v. Boyne City, Gaylord & Alpena Railroad, 286 F. 540, 546 (E.D. Mich. 1923) 13

Georgia Southern and Florida Railway v. Duval Connecting Railroad, 324 F.2d 801 (5th Cir. 1963) (per curiam) 12, 13

Louisiana & Arkansas Railway v. Missouri Pacific Railroad, 415 F.2d 751 (5th Cir. 1969), *cert. denied*, 396 U.S. 1060 (1970) 13

New Orleans Terminal v. Spencer, 366 F.2d 160, 166 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) 13

Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983) ... *Passim*

Nicholson v. Missouri Pacific Railroad Company, 366 I.C.C. 69 (1982) ..... *Passim*

Oregon-Washington Railroad & Navigation Co. Construction, 275 I.C.C. 591, 598 (1950) 13

Railroad Commission v. Southern Pacific, 264 U.S. 331 (1924) 14

Terminal Railway Alabama State Docks — Operation, Mobile, Ala., 354 I.C.C. 747, 749 (1978) 13

Texas & Pacific Railway v. Gulf, Colorado & Santa Fe Railway, 270 U.S. 266 (1926) 14

STATUTES:

49 U.S.C. § 10102(19) (Supp. V 1981) 8

49 U.S.C. § 10901(a) (Supp. V 1981) (formerly 49 U.S.C. § 1(18)) ..... *Passim*

49 U.S.C. § 10907(b) (Supp. V 1981) (formerly 49 U.S.C. § 1(22)) ..... *Passim*

Pub. L. No. 95-473, § 3(a), 92 Stat. 1337 (1978) 8

§ 402, Transportation Act of 1920, 41 Stat. 456, 476-78 5

No. 83-533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA;
LOUISIANA SOYBEAN ASSOCIATION; AND
MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

ON PETITICN FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION

OPINIONS BELOW

The decision by the United States Court of Appeals for the District of Columbia Circuit, reproduced as Appendix ("App.") A hereto, is reported as *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983). In that decision the court affirmed a February 11, 1982, decision of the Interstate Commerce Commission ("Commission") in Finance Docket No. 29657, reported as *Nicholson v. Missouri Pacific R.R.*, 366 I.C.C. 69 (1982). That Commission decision, reproduced as App. B hereto, in turn affirmed an August 28, 1981, decision of the Commission's Review Board No. 3. The

decision rendered by Review Board No. 3 is reproduced in App. C hereto.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED

Three statutory provisions are involved in this case.

49 U.S.C. § 10901(a) (Supp. V 1981) provides:

> *§ 10901. Authorizing construction and operation of railroad lines*
>
> (a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may —
>
> (1) construct an extension to any of its railroad lines;
>
> (2) construct an additional railroad line;
>
> (3) acquire or operate an extended or additional railroad line; or
>
> (4) provide transportation over, or by means of, an extended or additional railroad line;
>
> only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

49 U.S.C. § 10102(19) (Supp. V 1981) states as follows:

> *§ 10102. Definitions*
>
> In this subtitle —
>
> • • •

(19) "railroad" includes —

(A) a bridge, car float, lighter, and ferry used by or in connection with a railroad;

(B) the road used by a rail carrier and owned by it or operated under an agreement; and

(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

49 U.S.C. § 10907(b) (Supp. V 1981) provides:

§ *10907. Exceptions*

• • •

(b) The Commission does not have authority under sections 10901-10906 of this title over —

(1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State; or

(2) a street, suburban, or interurban electric railway that is not operated as part of a general system of rail transportation.

STATEMENT OF THE CASE

Petitioner Jerry K. Nicholson ("Nicholson") owns land in Pointe Coupee Parish in Louisiana. Since before the turn of the century, one of Missouri Pacific Railroad Company's ("MoPac") lines, has run across and bisected the eastern portion of Nicholson's land.

MoPac desires to build a switching yard adjacent to its line, but such a switching yard required the acquisition of land owned by four persons or groups, including Nicholson. The switching yard will cover a total of approximately 550 acres, about 300 of which were a part of Nicholson's

property. The new switching yard will not directly serve any shipper or receiver and will be used only for storage, switching, and classification (i.e., the sorting of cars by switching them into rational groups or "blocks") of cars. The MoPac's existing line will continue to handle through transportation. No other railroad is located anywhere near the yard site, and Nicholson does not allege that the new yard will invade the territory of another railroad.

Upon the failure to come to terms with Nicholson on the purchase of land necessary for the switching yard, the MoPac filed expropriation proceedings, which is the terminology used in Louisiana for eminent domain proceedings, in the Eighteenth Judicial District Court for the Parish of Pointe Coupee. Judgment has been rendered for MoPac in that case, and Nicholson's appeal of that judgment is currently pending.

Nicholson's resistance to the construction of the switching yard was not confined to the expropriation proceedings. Nicholson instituted the instant action by filing a complaint with the Interstate Commerce Commission, alleging that the expropriation proceedings filed by MoPac constituted construction of "an extension to any of its railroad lines," or "an additional railroad line" within the meaning of 49 U.S.C. §10901(a) (Supp. V 1981), for which a certificate of public convenience and necessity from the ICC would be required. Nicholson[1] requested that the MoPac be ordered to cease and desist from taking any further action concerning the yard.

In a decision (App. C, *infra* pp. 23a-25a) dated August 28, 1981, a Commission Review Board dismissed the complaint, finding that since a decision in the expropriation proceedings had not yet been rendered, the complaint was

---

[1] Several other landowners joined in Nicholson's complaint, but they all subsequently sold their land to the MoPac and are not involved in the instant proceedings.

not ripe for review. Upon appeal by Nicholson, the Commission affirmed the dismissal of Nicholson's complaint, but on different grounds. *Nicholson v. Missouri Pacific Railroad*, 366 I.C.C. 69 (1982); App. B, *infra* pp. 14a-22a. The Commission found the complaint ripe for review, but also found that the switching yard was not "an extension to any of [MoPac's] railroad lines," nor "an additional railroad line," but was, instead, within the "switching, or side tracks" exception of 49 U.S.C. § 10907(b) (Supp. V 1981). After observing that the Commission has had authority over the construction of extensions of line or additional lines since 1920,[2] but that neither the Commission nor any court has ever considered the construction of a switching yard to be an extension of line or additional line, the Commission noted:

> [T]he proposed classification yard is and can be used only for storage, switching, and classification. The transportation will continue to move over MoPac's existing main line. No shippers are located in the vicinity of the yard or will be directly served from the yard. No lines of any other carrier will reach the yard, so it cannot serve as a connecting track between two carriers. [Cit. omitted.] MoPac clearly believes that the yard will allow it to provide more extensive and efficient service over its existing rail lines and may permit it to capture additional traffic. However, we are convinced that the proposed yard is not a line of railroad or an extension of a line within the meaning of section 10901, since the operations to be performed at the yard are incidental to line-haul transportation [footnote omitted].

---

[2] 49 U.S.C. § 10901(a) (Supp. V 1981) is a recodification of the former 49 U.S.C. § 1(18), and 49 U.S.C. § 10907(b) (Supp. V 1981) is a recodification of the former 49 U.S.C. § 1(22). The old sections 1(18) and 1(22) were added to the Interstate Commerce Act by § 402 of the Transportation Act of 1920, 41 Stat. 456, 476-78.

Nicholson v. Missouri Pacific Railroad, 366 I.C.C. 69, 73-74 (1982); App. B, *infra* p. 21a.

The Commission therefore upheld the dismissal of Nicholson's complaint, whereupon Nicholson sought review by the United States Court of Appeals for the District of Columbia. MoPac intervened. Nicholson's instant petition for writ of certiorari seeks review of the Court of Appeal's decision, *Nicholson v. ICC*, 711 F.2d 364 (D.C. Cir. 1983); App. A, *infra* pp. 1a-13a, that upheld the Commission. After observing that the distinction between "lines" requiring Commission approval and excepted "switching, or side tracks" "turns on the intended use of the track segment, not on the label or cost of the segment," *Nicholson v. ICC*, 711 F.2d at 367; App. A, *infra* p. 7a, the Court of Appeals held:

> The yard will be located adjacent to Missouri Pacific's existing main-line track in Pointe Coupee Parish and will be used solely for storage, *switching*, and classification of railroad cars. Although the classification yard is expected to increase Missouri Pacific's efficiency in handling freight traffic, the yard will not extend Missouri Pacific's service into any new territory. Through trains will continue to move over Missouri Pacific's existing main-line track to their prior destination; the classification yard will be *incidental* to the operation of trains over that track.

Nicholson v. ICC, 711 F.2d at 368; App. A, *infra* at p. 9a (emphasis in original).

THERE ARE NO VALID REASONS FOR GRANTING A WRIT

Nicholson's assertions notwithstanding, the instant case clearly does not involve an attempt by the ICC to "deregulate" the construction of switching yards. Simply stated, the ICC has never attempted to regulate the construction of switching yards because the ICC has never had the authority to regulate such railroad activity. It is beyond dispute that the purpose and function of the tracks to be built for the yard at issue are the same as any and all other "switching, or side tracks" excepted from ICC regulation by 49 U.S.C. § 10907(b)(1) (Supp. V 1981): i.e., the switching and storage of cars. Nicholson vainly seeks to avoid the "switching, or side tracks" exception of § 10907(b)(1) by referring to the yard as a "classification yard," rather than a switching yard, but the two are synonymous: to "classify" cars means to sort the cars by switching them into rational groups or blocks. Every classification track is a switching track, and all "switching, or side tracks" are excepted from ICC regulation by section 10907(b)(1).

I.

THE TRACKS TO BE BUILT FOR THE SWITCHING YARD HAVE NONE OF THE HALLMARKS OF "RAILROAD LINES" AND ARE CLEARLY "SWITCHING, OR SIDE TRACKS" EXCEPTED FROM ICC REGULATION UNDER SECTION 10907(b)

Section 10901(a) of the recodified Interstate Commerce Act provides, in pertinent part, that a rail carrier subject to the Act must first secure the authorization of the ICC before it may— "(1) construct an extension to any of its railroad *lines*; [or] (2) construct an additional railroad *line*."[3] By contrast, section 10907(b)(1) of the Act makes

[3] 49 U.S.C. § 10901(a) (Supp. V 1981) (emphasis added).

it clear that: "The Commission does not have authority under sections 10901-10906 of this title over — (1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, *switching, or side tracks* if the tracks are located, or intended to be located, entirely in one State."[4]

Nicholson argues that since the definition of "railroad" in 49 U.S.C. § 10102(19) (Supp. V 1981), in the definitions section of the recodified Act includes "yard," then the tracks to be built for the switching yard are necessarily "railroad lines," rather than "switching, or side tracks." In so arguing, Nicholson overlooks the fact that the distinction made in the statutes is not between that which is railroad and that which is not railroad, but between "lines" of railroad[5] and "switching, or side tracks." To say that the tracks to be built for a switching yard are a part of a "railroad" is not to say that they are "railroad lines," or, to use the pre-recodification language, "lines of railroad."

Nicholson's insistence that "lines" be read out of section 10901(a), and only "railroad" be given effect, proves too much. The definition of "railroad" in section 10102(19) also includes "ground," but "ground" is not expressly excepted in section 10907(b), so under Nicholson's rationale, the purchase of or construction on "ground" is

---

[4] 49 U.S.C. § 10907(b)(1) (Supp. V 1981) (emphasis added).

[5] 49 U.S.C. § 10901(a) (Supp. V 1981) is a recodification without substantive change, *see* Pub. L. No. 95-473, § 3(a), 92 Stat. 1337 (1978), of the old 49 U.S.C. § 1(18), which provided in pertinent part: "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, . . . unless and until there shall first have been obtained from the Commission a certificate . . ." While the recodification was an admirable accomplishment, the old § 1(18)'s "line of railroad" perhaps made the intended focus of attention slightly more obvious than in its recodified form of "railroad line" in the new § 10901(a).

necessarily a "railroad line" which must be first authorized by the ICC. As the ICC noted:

> This argument does not withstand scrutiny; it would imply for example, that a carrier needs our approval before acquiring "ground" to be used to construct a communications facility. A railroad clearly requires some property that cannot be considered a "railroad line." We must look beyond the definition of "railroad" to define "railroad line."[6]

Nicholson mistakenly suggests that because the yard in question is to be a "classification yard," something significantly different from or in addition to switching is involved.[7] "Classification" of cars, however, simply means to sort the cars by switching them into rational groups or blocks. A classification yard is a switching yard, and every classification track is a switching track.

There is, in fact, no real dispute that the use of the tracks to be built will be the same as for any and all other "switching, or side tracks." Indeed, Nicholson does not challenge the fundamental findings of fact by the ICC that:

> [T]he proposed classification yard is and can be used only for storage, switching, and classification. The transportation will continue to move over MoPac's existing main line. No shippers are lo-

---

[6] Nicholson v. Missouri Pac. R.R., 366 I.C.C. at 72 n.5; App. B, *infra* p. 19a n.5.

[7] *See* Petition of Nicholson for Writ of Certiorari at 11 n.9, Nicholson v. ICC, No. 83-533 (U.S. Sept. 28, 1983) ("Missouri Pacific's proposed classification yard is distinguishable readily; it will involve far more than switching."); *see also id.* at 12 ("Thus, the facts that Missouri Pacific's proposed classification yard . . . will be used *in part* for switching . . . .") (emphasis in original).

> cated in the vicinity of the yard or will be directly served from the yard. No lines of any other carrier will reach the yard, so it cannot serve as a connecting track between two carriers. [Cit. omitted.][8]

Nicholson concedes that the "proposed classification yard will not be part of the railroad's main line track, [and] will not extend the railroad's service into any new territory."[9] Further, Nicholson does not challenge the finding made by the ICC[10] and upheld by the court of appeals[11] that the operations at the yard will be only incidental to line-haul transportation. Since it is not disputed that the yard will be merely incidental to line-haul transportation and be used only for storage, switching, and classification, and will not directly serve any rail customer, extend into

---

[8] Nicholson v. Missouri Pac. R.R., 366 I.C.C. at 73-74; App. B, *infra* p. 21a.

The court of appeals also found:

> The yard will be located adjacent to Missouri Pacific's existing main-line track in Pointe Coupee Parish and will be used solely for storage, *switching*, and classification of railroad cars. Although the classification yard is expected to increase Missouri Pacific's efficiency in handling freight traffic, the yard will not extend Missouri Pacific's service into any new territory. Through trains will continue to move over Missouri Pacific's existing main-line track to their prior destinations; the classification yard will be *incidental* to the operation of trains over that track.

Nicholson v. ICC, 711 F.2d 364, 368 (D.C. Cir. 1983); App. A, *infra* p. 9a (emphasis in original).

[9] Petition of Nicholson for Writ of Certiorari at 12, Nicholson v. ICC, No. 83-533 (U.S. Sept. 28, 1983).

[10] *See* Nicholson v. Missouri Pac. R.R., 366 I.C.C. at 74; App. B, *infra* p. 21a.

[11] *See* Nicholson v. ICC, 711 F.2d at 368 & 369; App. A, *infra* pp. 9a & 12a.

new territory, or be used as a part of the actual transportation haul from shipper to receiver, there is no basis to question the holding of the court of appeals that the tracks to be built are "switching, or side tracks" and have none of the hallmarks of "railroad lines" or "lines of railroad."

Nicholson argues that merely because the tracks to be built for the switching yard will cost a substantial amount of money, those tracks must be deemed to be "railroad lines." Section 10901(a), however, does not so provide. There is certainly no basis in the statute or in common sense for transforming a switching yard into a "railroad line" or "line or railroad" simply because it will cost a substantial amount of money. Far more money was spent on the MoPac's state of the art computer system than will ever be spent on the switching yard in question, but that does not make a computer system a "railroad line". Similarly, the substantial amount of the money to be spent on building the tracks for the switching yard does not transform those "switching, or side tracks" into "railroad lines" or "lines of railroad."

Lastly, Nicholson argues that because the tracks to be built for the switching yard will help the MoPac to provide more efficient service and, as a result, will likely induce potential shippers to ship via MoPac, these switching tracks become "railroad lines" or "lines of railroad." But the mere fact that the new yard will improve service and consequently increase MoPac's business hardly turns "switching, or side tracks" into "railroad lines" or "lines of railroad." Indeed, *all* of the tracks excepted under section 10907(b) — "spur, industrial, team, switching, or side tracks" — are intended to improve rail service.

II.

THE DECISION BELOW IS SQUARELY IN LINE WITH THE ADMINISTRATIVE AND JUDICIAL PRINCIPLES AND DECISIONS THAT HAVE BEEN FOLLOWED FOR OVER SIXTY YEARS

Petitioner Nicholson attempts to argue that the instant case "is one of first impression,"[12] but in reality, the law in this area has been well-established for decades. In *Georgia Southern and Florida Railway v. Duval Connecting Railroad*,[13] for example, a railroad had to resort to condemnation for some of the land that it needed for a new classification and switching yard. One of the remaining parcels was owned by a competitor railroad, the Georgia Southern, which filed suit to enjoin the condemnation on the grounds that ICC approval for the yard was required under the predecessor to the present section 10901(a), the old section 1(18).[14] Nicholson suggests that the classification yard in *Georgia Southern* "*may* have had very different characteristics from Missouri Pacific's proposed classification yard,"[15] but examination of that opinion shows how similar the situation there was to the instant case. The yard in *Georgia Southern* was a classification yard, just as the yard in question here is; moreover, at about five miles in length, it was actually about a mile and one-half longer than the yard in question here. Furthermore, the yard in *Georgia Southern* was estimated to cost about $20,000,000 in 1963 dollars, which was also a substantial amount of money. Like the court of appeals below,

---

[12] Petition of Nicholson for Writ of Certiorari at 9, Nicholson v. ICC, No. 83-533 (U.S. Sept. 28, 1983).

[13] 324 F.2d 801 (5th Cir. 1963) (per curiam).

[14] Former 49 U.S.C. § 1(18), now recodified without substantive change at 49 U.S.C. § 10901 (Supp. V 1981).

[15] Petition of Nicholson for Writ of Certiorari at 10 n.8, Nicholson v. ICC, No. 83-533 (U.S. Sept. 28, 1983) (emphasis added).

the *Georgia Southern* Court had no trouble in finding that the yard there was not an "additional line" or an "extension" of a line of railroad.[16] Previous ICC decisions that have addressed the question are also in accord.[17]

Nicholson asserts that "The court of appeals has announced a new principle of federal law — that 'track segments which are merely incidental to, *and not required for*, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b).' 711 F.2d at 368."[18] Petitioner's contention is unconvincing because the court's observation was simply an echo of the distinction made some sixty years ago in *Detroit & Mackinac Railway v. Boyne City, Gaylord & Alpena Railroad*,[19] and reaffirmed some seventeen years ago in *New Orleans Terminal v. Spencer*.[20]

---

[16] *See* Georgia S. & F. Ry. v. Duval Connecting R.R., 324 F.2d at 802. *See also, e.g.*, Louisiana & Ark. Ry. v. Missouri Pac. R.R., 415 F.2d 751, 752 (5th Cir. 1969), *cert. denied*, 396 U.S. 1060 (1970) (track that had been used only for switching and served only one industry held to be spur and switching track excepted from ICC regulation under the old § 1(18)).

[17] *See, e.g.*, Terminal Ry. Ala. State Docks – Operation, Mobile, Ala., 354 I.C.C. 747, 749 (1978) (purchase of tracks to be used "as a switching yard and to furnish connection terminal switching" held to be a transaction excepted from regulation under the old § 1(18)); *see also* Oregon-Wash. R.R. & Nav. Co. Constr., 275 I.C.C. 591, 598 (1950) (a new yard was to be built in connection with an application to abandon an old line and construct a new line; ICC noted that construction of the new yard was not subject to ICC regulation), *cited with approval in* Boston Term. Co. Reorg., 312 I.C.C. 373, 378 (1960).

[18] Petition of Nicholson for Writ of Certiorari at 12, Nicholson v. ICC, No. 83-533, (U.S. Sept. 28, 1983) (emphasis added by Nicholson).

[19] 286 F. 540, 546 (E.D. Mich. 1923).

[20] 366 F.2d 160, 166 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967).

The court of appeals opinion does not turn on the "and not required for" language that appears once in the opinion, but instead is clearly based on the undisputed facts that the yard is merely incidental to line-haul transportation and will be used only for storage, switching, and classification, and will *not* directly serve any rail customer, extend into new territory, or be used as a part of the actual line-haul transportation from shipper to receiver.

Petitioner's reliance on *Texas & Pacific Railway v. Gulf, Colorado & Santa Fe Railway*[21] and *Railroad Commission v. Southern Pacific*,[22] which are discussed in the opinion of the court of appeals, is misplaced. Those precedents are easily distinguishable on their facts from the case at hand. In *Texas & Pacific*, the T&P filed suit because the Santa Fe was attempting to build trackage that not only extended into territory not theretofore served by the Santa Fe, but extended into territory already served by the T&P.[23] This Court properly held the Santa Fe's trackage to be an extension of its line. In *Southern Pacific*, the State Railroad Commission had ordered the SP and two other railroads to abandon their separate passenger stations, and their separate lines to those stations, and to build one combined passenger terminal and to construct new lines to that new terminal. This Court not surprisingly found that such actions required the prior approval of the ICC under the predecessor to the present section 10901(a), the old section 1(18). Unlike those cases, the dispute involved here plainly does not involve the construction of new lines.

---

[21] 270 U.S. 266 (1926).

[22] 264 U.S. 331 (1924).

[23] *See* 270 U.S. at 278.

III.

THE DECISION BELOW IS NOT A SUB ROSA ATTEMPT TO DEREGULATE, BUT IS SIMPLY A REAFFIRMANCE THAT FOR OVER SIXTY YEARS, SECTION 10907(B) AND ITS PREDECESSOR HAVE EXCEPTED FROM ICC REGULATION "SWITCHING, OR SIDE TRACKS"

Petitioner Nicholson declares that "[w]hat the Commission has done, with the court's concurrence, is to 'deregulate' the construction of railroad classification yards.[24] That argument is without merit. The ICC has never had authority to regulate the construction of switching yards and has never attempted to do so. The Commission decision below is not a *sub rosa* attempt to deregulate, but simply a reaffirmance of what the ICC and the courts have held for over sixty years: "switching, or side tracks" are excepted from ICC regulation.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN P. LEGENDRE
(Counsel of Record)
505 North Industrial
Boulevard
Dallas, Texas 75207
(214) 760-3052

Attorney for Respondent
MISSOURI PACIFIC RAILROAD
COMPANY

Of Counsel
F. W. READ, III
& ROBERT B. BATCHELDER
1416 Dodge Street
Omaha, Nebraska 68179

Date:

---

[24] Petition of Nicholson for Writ of Certiorari at 7, Nicholson v. ICC, No. 83-533 (U.S. Sept. 28, 1983).

CERTIFICATE OF SERVICE

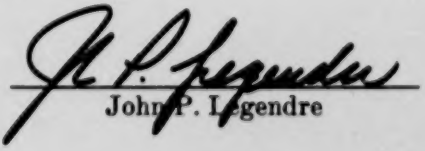
I, John P. Legendre, hereby certify that on this 27th day of October, 1983, I have served three (3) copies of the foregoing Brief for Respondent Missouri Pacific Railroad Company in Opposition on each of the counsel for all parties of record by depositing same in a United States post office or mailbox, with first-class postage prepaid, addressed as follows:

Mr. Fritz R. Kahn
1660 L St., N.W., Suite 1100
Washington, D.C. 20036

Mr. Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

Mr. John P. Fonte
Antitrust Division
Department of Justice
Washington, D.C. 20530

Mr. Sidney L. Strickland, Jr.
Interstate Commerce Commission
Washington, D.C. 20423



John P. Legendre

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1428

JERRY K. NICHOLSON, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

LOUISIANA SOYBEAN ASSOCIATION,
MISSOURI PACIFIC RAILROAD COMPANY,
INTERVENORS

Petition for Review of an Order of the
Interstate Commerce Commission

Argued January 10, 1983

Decided June 30, 1983

Fritz R. Kahn, for petitioner and intervenor, Louisiana Soybean Association.

Sidney L. Strickland, Jr., Attorney, Interstate Commerce Commission, with whom *John Broadley,* General Counsel, *Ellen D. Hanson,* Associate General Counsel, Interstate Commerce Commission, *John P. Powers, III*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

and *Kenneth P. Kolson*, Attorneys, U.S. Department of Justice, were on the brief, for respondents.

John P. Legendre, for intervenor, Missouri Pacific Railroad Company.

John J. Rademacher, was on the brief for American Farm Bureau Federation, Amicus Curiae, urging that the order under review herein be vacated.

Henry H. Bernard, Jr., was on the brief for Louisiana Farm Bureau Federation, Inc., Amicus Curiae, urging that the order under review herein be vacated.

James I. Collier, Jr., was on the brief for Association of American Railroads, Amicus Curiae, urging affirmance.

Before: ROBINSON, *Chief Judge*, WALD, *Circuit Judge*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

MACKINNON, *Senior Circuit Judge*: Petitioner, Jerry K. Nicholson, challenges an order of the Interstate Commerce Commission (Commission) which dismissed his complaint alleging that the Missouri Pacific Railroad Co. (Missouri Pacific) had violated the Interstate Commerce Act, 49 U.S.C. § 10901(a) (Supp. V 1981),[1] by attempt-

[1] 49 U.S.C. § 10901(a) (Supp. V. 1981) provides:

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission . . . may –
>
> (1) construct an extension to any of its railroad lines;
>
> (2) construct an additional railroad line;
>
> (3) acquire or operate an extended or additional railroad line; or
>
> (4) provide transportation over, or by means of, an extended or additional railroad line;
>
> only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

ing to build a railroad line — to wit, a classification yard adjacent to its main-line track in Pointe Coupee Parish, Louisiana — on his land without a finding by the Commission of public convenience and necessity. The Commission ruled that the classification yard was not a "railroad line" requiring the approval called for by section 10901 (a), but rather was a switching track excepted from Commission jurisdiction by 49 U.S.C. § 10907(b)(1) (Supp. V 1981).[2] *Nicholson v. Missouri Pacific R.R.*, 366 I.C.C. 69, 72-74 (1982). Because well-established judicial and Commission precedent compel the conclusion that the proposed Missouri Pacific classification yard is not a "railroad line" requiring Commission approval, we affirm the Commission's order.

I.

Petitioner owns farmland in Pointe Coupee Parish, Louisiana, on which he grows soybeans and other crops. Missouri Pacific presently owns a right-of-way over petitioner's land for the operation of a single-line track of railroad, but wishes to construct a classification yard adjacent to its track on petitioner's land. The numerous tracks in the yard will be used to switch cars in the making up and breaking up of freight trains, to arrange cars of trains in delivery order, and to sort cars in trains by types of cars or contents preparatory to train movement.[3] As a public utility, Missouri Pacific has filed

[2] 49 U.S.C. § 10907(b) (Supp. V 1981) (emphasis added) provides:

> The Commission does *not* have authority under sections 10901-10906 of this title over –
>
> (1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, *switching*, or side tracks if the tracks are located, or intended to be located, entirely in one State . . . .

[3] The proposed classification yard will be approximately 3.5 miles long and 0.5 miles wide, will cover approximately 550

an action under state law in Louisiana state court to acquire by condemnation the necessary portion of petitioner's land. *Missouri Pacific R.R. v. Nicholson*, Civil Action No. 17299 (La. Dist. Ct. 1981).

Petitioner[4] filed a complaint with the Commission seeking a cease and desist order to prevent Missouri Pacific from taking any steps to construct the classification yard without Commission approval pursuant to section 10901 (a).[5] Petitioner contended that the classification yard would be "an additional railroad line" requiring the Commission's prior approval and that the Commission had not made the findings required by the statute. 49 U.S.C. § 10901(a) (Supp. V 1981). A Commission Review Board dismissed the complaint because it was not ripe for review. The Review Board reasoned that a "civil decision against [Missouri Pacific] may totally moot the issue of whether Commission approval of [Missouri Pacific's] construction is required." *Nicholson v. Missouri Pacific R.R.*, Finance Docket No. 29657, slip op. at 2 (Sept. 15, 1981). On appeal, the Commission affirmed the dismissal of petitioner's complaint, although on different grounds. *Nicholson v. Missouri Pacific R.R., supra*, 366 I.C.C. at 69.

The Commission found that the complaint was ripe for review because petitioner had demonstrated "a substantial probability that if the Commission waits, [petitioner] would be harmed by the challenged conduct before the Commission could determine its legality." *Id.* at 72. However, the Commission also found that the operations

---

acres, and will consist of over 100 miles of track. The facility will cost Missouri Pacific approximately $75 million.

[4] Several other affected landowners joined in petitioner's complaint, but all have subsequently sold their land to Missouri Pacific and are not parties to this appeal. Brief for Intervenor, Missouri Pacific Railroad Co., at 3.

[5] *See* note 1 *supra*.

which would be performed at the classification yard would be *incidental* to main-line transportation and that such transportation would continue over Missouri Pacific's existing track. Noting that it had consistently held yards exempt from its jurisdiction under section 10907(b),[6] and had never authorized the construction of a classification yard, the Commission ruled that the proposed classification yard was not a railroad line requiring approval pursuant to section 10901(a). *Id.* at 72-74. This petition for review followed.

II.

Petitioner contends that the Commission erred in concluding that construction of the proposed classification yard did not require its approval.[7] Petitioner argues that

---

[6] *See* note 2 *supra.*

[7] Petitioner also raises several frivolous procedural arguments in his petition for review. Petitioner asserts that the Commission erred in denying the requests of the Louisiana Soybean Association, the American Farm Bureau Federation, and the Louisiana Farm Bureau Federation to intervene in the Commission proceeding. However, the Commission properly concluded that these organizations sought

> intervention to present testimony *if the Commission holds a hearing* on whether destruction of agricultural land to build a classification yard is warranted. Because of our ultimate decision dimissing the complaint [for lack of jurisdiction over the proposed construction], no purpose would be served in permitting these parties to intervene.

Nicholson v. Missouri Pacific R.R., *supra*, 366 I.C.C. at 69 n.2 (emphasis added). We find, in any event, that the clarity of the legal principles mandating our affirmance of the Commission's order obviates remand for purposes of intervention by these parties.

Next petitioner contends that the Commission's decision was improper because only two Commissioners of the three Commissioner Division assigned to consider his complaint participated in that decision – one Commissioner would have participated only in the event of a tie. *See id.* at 74. The simple response to this argument is that the Interstate Commerce Act provides that the Commission

because section 10102(19) of the Interstate Commerce Act defines *"railroad"* to include "yard,"[8] the Act's requirement that Commission authorization be received prior to construction of *"railroad* lines" necessarily encompasses construction of "yards." Petitioner also argues that because the proposed classification yard will cost $75 million, the substantiality of the cost requires the Com-

---

may carry out its duties in Divisions consisting of three Commissioners, 49 U.S.C. §§ 10302(a), 10305 (Supp. V 1981), and that a majority of a Division is a quorum for the transaction of business. *Id.* § 10306(a). Since a quorum of the assigned Division dismissed petitioner's complaint, its decision was valid. Northern Valley Transfer, Inc. v. ICC, 192 F. Supp. 600, 603 (D.N.J. 1961).

Finally, petitioner asserts that the decision was improper because the Commission was "politically imbalanced" at the time it was rendered; at that time the Commission consisted of three Republicans and one Democrat. However, petitioner concedes, as he must, that nothing in the Interstate Commerce Act requires a Division of the Commission to be politically balanced. Brief for Petitioner at 31. Thus petitioner can assert no injury as a result of the composition of the Commission since his complaint could have been assigned to a Division of the same Commissioners even if the Commission had consisted of a full contingent of eleven Commissioners, six from one party and five from the other. *See* 49 U.S.C. § 10301(b) (Supp. V 1981). Petitioner's real grievance with respect to the composition of the Commission lies with the President and the Senate, who failed to appoint and confirm additional Commissioners, and not with the validly appointed Commissioners who then composed the Commission. Assure Competitive Transp., Inc. v. United States, 629 F.2d 467, 474-75 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981). The Act authorizes those Commissioners to exercise the powers of the Commission irrespective of vacancies in the membership of the Commission. 49 U.S.C. § 10301(e) (Supp. V 1981).

[8] 49 U.S.C. § 10102(19) (Supp. V 1981) (emphasis added) provides:

> "railroad" includes –
>
> . . . .
>
> (C) a switch, spur, track, terminal, terminal facility, and freight depot, *yard*, and ground, used or necessary for transportation.

mission to rule upon the project prior to its construction. We find these arguments to be without merit.

It is well established that the determination of whether a particular track segment is a "railroad line," requiring Commission authorization pursuant to section 10901(a), or a "spur, industrial, team, switching, or side" track, exempt from Commission jurisdiction pursuant to section 10907(b),[9] turns on the intended use of the track segment, not on the label or cost of the segment. It was held early on that

> it is sufficiently plain, from a consideration of not only the obvious purpose prompting the [Interstate Commerce Act[10]] but also of the general nature of the tracks mentioned, that Congress intended *to subject to the requirements of* [*section 1(18)*] so-called main or branch lines of railroad, that is, *lines*

---

[9] Congress first codified the provisions of the Interstate Commerce Act in 1978. Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 Prior to that time the provisions of sections 10901 and 10907 were found at section 1(18) of the Act. Insofar as is relevant to this case, the codification made no substantive changes in these provisions. *See* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319 n.7 (1981).

[10] The court indicated that the purpose of Congress in enacting the Interstate Commerce Act was,

> as was pointed out by Interstate Commerce Commissioner Clark while speaking before the Committee on Interstate and Foreign Commerce of the House of Representatives, . . . "to prevent the building of duplicate lines of railroad because of keen rivalry of certain financial interests, or when the railroads so built will not serve the present or future convenience and necessity, and will simply depend for traffic upon that which they can get away from railroads already built, adding to the total burden of maintenance, capital returns, etc., which the public must pay."

Detroit & M. Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 545 (E.D. Mich. 1923).

> *designed and used for continuous transportation service by through, full trains between different points of shipment or travel, and to exclude* from the operation of the statute *all that mass of "tracks"* (as distinguished from "lines") naturally and necessarily *designed and used for* loading, unloading, *switching,* and other *purposes connected with, and incidental to,* but not actually and directly used for, *such transportation service.*

Detroit & M. Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 546 (E.D. Mich. 1923) (emphasis added).[11] Shortly thereafter, the Supreme Court held that

> [*i*]*f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad* within the meaning of [section 1(18) of the Act], although the line be short and although the character of the service contemplated be that commonly rendered . . . by means of spurs or industrial tracks.

Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., 270 U.S. 266, 278 (1926) (emphasis added). Thus it can be seen that track segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the Com-

---

[11] *Accord* New Orleans Terminal Co. v. Spencer, 386 F.2d 160, 165-66 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) (emphasis added) ("If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a 'line of railroad, or extension thereof . . . .' If, however, the trackage is used in the loading, reloading, storage and switching of cars *incidental* to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is 'spur, industrial, team, switching or side tracks' and as such, not under Commission jurisdiction").

mission pursuant to section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b).[12]

Application of these principles to Missouri Pacific's proposed classification yard compels the conclusion that construction of the Pointe Coupee Classification Yard is not the construction of a "railroad line" requiring Commission approval pursuant to section 10901(a). The yard will be located adjacent to Missouri Pacific's existing main-line track in Pointe Coupee Parish and will be used solely for storage, *switching*, and classification of railroad cars. Although the classification yard is expected to increase Missouri Pacific's efficiency in handling freight traffic, the yard will not extend Missouri Pacific's service into any new territory. Through trains will continue to move over Missouri Pacific's existing main-line track to their prior destinations; the classification yard will be *incidental* to the operation of trains over that track. Accordingly, construction of the classification yard is exempted from Commission jurisdiction by section 10907(b).

Support for this conclusion is found in a decision of the Fifth Circuit which held, without explanation, that

---

[12] That a track segment is or is not identified as a "spur, industrial, team, switching, or side" track is not determinative or whether it is exempted by section 10907(b) from Commission jurisdiction. *See, e.g.*, Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., *supra*, 270 U.S. at 274-79 (track segment identified as "industrial" track held to require Commission approval pursuant to section 1(18)); New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 165-66 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) (track segment identified as "side" track held to require Commission approval pursuant to section 1(18)); Georgia S. & Fla. Ry. v. Duval Connection R.R., 324 F.2d 801, 802 (5th Cir. 1963) (per curiam) (track segment identified as "yard" track held not to require Commission approval pursuant to section 1(18)).

Commission approval pursuant to section 1(18) of the Interstate Commerce Act[13] was not required prior to the construction of a classification yard. *Georgia S. & Fla. Ry. v. Duval Connecting R.R.*, 324 F.2d 801, 802 (5th Cir. 1963) (per curiam). Furthermore, the Commission has consistently interpreted the Act as not requiring its approval prior to the construction of yards:

> The applicant correctly states that the construction of a *new yard* and the consolidation of terminal facilities *are not within themselves subject to the jurisdiction of this Commission* and may be accomplished without its authority.

Oregon-Washington R.R. & Navigation Co. Construction, 275 I.C.C. 591, 598 (1950) (emphasis added). *Accord Terminal Ry. Ala. State Docks — Operation, Mobile, Ala.*, 354 I.C.C. 747, 749 (1978); *Boston Terminal Co. Reorganization*, 312 I.C.C. 373, 378 (1960).

Petitioner's arguments do not require a contrary result. The fact that the Interstate Commerce Act defines "railroad" to include "yard" does not support an interpretation that the phrase "railroad line" includes switching yards. There is a distinction in the statute between "railroad" and "railroad line." *See Long Island R.R. v. New York C.R.R.*, 281 F.2d 379, 382-83 (2d Cir. 1960).[14] Petitioner's reasoning simply ignores the significance of the term "line" in the phrase "railroad line," as well as sixty years of judicial and Commission interpretation of that phrase. Furthermore, nothing in the Act requires Commission authorization of railroad construction projects solely because such projects are costly. [15] It is the

[13] *See* note 9 *supra*.

[14] *See also* note 12 *supra*.

[15] *Cf.* 49 U.S.C. § 11301 (Supp. V 1981) (Commission approval required prior to issuance of certain securities by railroads; Commission required to investigate intended use of proceeds from sale of such securities prior to approval).

purpose, and not the cost, of such projects which determines whether Commission approval is required.

Petitioner contends that his position is supported by several Supreme Court decisions, but we find this reliance to be misplaced. The opinion by Chief Justice Taft in *Railroad Commission v. Southern Pacific Co.*, 264 U.S. 320 (1924), comes the closest to discussing the point at issue, but it is distinguishable on its facts. In *Southern Pacific* the Court held that the Commission was required to give its approval before the City of Los Angeles could require three national railroads to replace their existing passenger stations with a single union station. *Id.* at 347. The plan for the new union station required the three railroads to make substantial *extensions* to their main-line tracks, which, while not great in distance, would "involve a new intramural destination for every railway with important changes in the handling of interstate traffic and passengers" and great expense to change the routes of "the *main tracks* in a crowded city." *Id.* at 346 (emphasis added). These substantial changes necessarily involved the abandonment by the three railroads of the main-line tracks that previously served their old depots and the *extension* of their main lines to the new terminal as ordered by the California State Railroad Commission at the request of the City of Los Angeles.

The project considered by the Court in *Southern Pacific* is clearly distinguishable from the Pointe Coupee Classification Yard because, as the Commission found, "the proposed [classification] yard is *not a line of railroad or an extension of a line* within the meaning of section 10901, since the operations to be performed at the yard are incidental to line-haul transportation." *Nicholson v. Missouri Pacific R.R., supra,* 366 I.C.C. at 74 (emphasis added) (footnote omitted). This factual description of the classification yard leaves the Commission without jurisdiction over the proposed construction. *See* 49 U.S.C.

§§ 10901(a), 10907(b)(1) (Supp. V 1981). The absence of any change in, or *extension* of Missouri Pacific's main-line track, distinguishes its classification yard project from the union station project and associated new main lines that required Commission approval in *Southern Pacific*.[16]

III.

Missouri Pacific's proposed classification yard will be *incidental* to the operation of its existing main-line track

---

[16] The other cases upon which petitioner relies are similarly inapposite and do not require a different result than we reach: L. Singer & Sons v. Union Pacific R.R., 311 U.S. 295, 303-04 (1940) (interest of merchant at market in Kansas City, Missouri was not sufficiently affected to give him right to enjoin construction of an extention of track by the Union Pacific Railroad to a new competing market in Kansas City, Kansas where such extension did not constitute a material change in the railroad's transportation system); Texas v. United States, 292 U.S. 522, 528-35 (1934) (Commission was empowered under the Emergency Railroad Transportation Act of 1933, in the interest of economy, to authorize lease of one interstate railway to another and to permit lessee to abandon or remove the general offices and shops of lessor even though such abandonment or removal was prohibited by the law of the state of lessor's incorporation in which such offices and shops were located); Piedmont & N. Ry. v. ICC, 286 U.S. 299, 303-05, 308-12 (1932) (electric line carrier that proposed to build two *extensions* of 53 and 73 miles respectively was not exempt from the requirement of obtaining a certificate of public convenience and necessity for such construction as a "street, suburban, or interurban electric railway" under section 1(22) of the Interstate Commerce Act where its track on city streets was only 2.9 miles – 2.25 percent of its total track – and its business was pre-eminently interchange, interstate freight traffic of national character in all respects conducted the same as the business of steam freight carriers in the territory served); Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., *supra*, 270 U.S. at 276-79 (*see* discussion at p. 8 *supra;* new 7.5 mile track intended to serve *new territory* currently being served by a competitor constitutes an *extension* of railroad within the meaning of the Transportation Act of 1920, and is not a spur or industrial track).

that runs through Pointe Coupee Parish, Louisiana. It does not involve any change in or extension of its main-line track and it qualifies as "switching" tracks that are specifically excluded by section 10907(b)(1) from the authority of the Commission under section 10901(a). Accordingly, the provisions of section 10901(a) do not require that Missouri Pacific obtain Commission authorization in order to construct said yard. The decision of the Commission so holding and dismissing petitioner's complaint against Missouri Pacific is therefore affirmed.

Judgment accordingly.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29657

JERRY K. NICHOLSON, NICK H. BRUCKERHOFF, OLIVER MAJOR AND HALLOWAY PLANTING CO. v. MISSOURI PACIFIC RAILROAD COMPANY

Decided February 11, 1982

The construction of a classification yard is exempt from Commission regulation pursuant to 49 U.S.C. 10907(b)(1). Complaint dismissed.

Fritz R. Kahn, John R. Long, and *Thomas E. Acey, Jr.,* for complainants.

William R. McDowell, R. H. Stahlheber, and *John P. Legendre* for defendants.

Louis D. Curet, John J. Rademacher, and *Larry LeJeune* for intervenors.

DECISION

By the Division:

In a decision served September 15, 1981, Review Board Number 3 dismissed as premature a complaint alleging that the Missouri Pacific Railroad Company (MoPac) had violated 49 U.S.C. 10901 by constructing a line of railroad without Commission approval. A joint appeal was filed by complainants[1] and petitions for leave to intervene were filed

---

[1] Jerry K. Nicholson, Nick H. Bruckerhoff, Oliver Major, and Halloway Planting Co.

by several parties.[2] We are denying the joint appeal and affirming the previous decision on different grounds.

FACTS

Complainants are owners of certain tracts of land located near Livonia, in Pointe Coupee Parish, LA, over which MoPac owns a right-of-way for the operation of a single-line track of railroad. Complainants allege that MoPac seeks to expropriate portions of their property to construct a classification yard. The yard will be approximately 19,217 feet long and 2,000 feet wide, and will be located along one side of, and adjacent to, the main line of MoPac's Alexandria subdivision. It will be built on 555.625 acres in a rural, agricultural area.

To obtain the land needed for the classification facility, MoPac has filed an eminent domain civil action in Pointe Coupee Parish. Complainants urge that MoPac has never sought nor received a determination by this Commission under 49 U.S.C. 10901 authorizing the proposed construction. They argue that section 10901 expressly includes a yard as being embraced within the meaning of the term "railroad line" as used in section 10901,[3] and point to 49 U.S.C.

---

[2] The Louisiana Soybean Association, the American Farm Bureau Federation, and the Louisiana Farm Bureau Federation request intervention to present testimony if the Commission holds a hearing on whether destruction of agricultural land to build a classification yard is warranted. Because of our ultimate decision dismissing the complaint, no purpose would be served in permitting these parties to intervene. Accordingly, the requests are denied.

[3] Section 10901(a) reads, as follows:

A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter 1 of chapter 105 of this title may –

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

10102(19)(C) which defines a "railroad" as including "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." Their conclusion is that section 10901 expressly requires MoPac authorization from this Commission prior to the prosecution of an eminent domain proceeding.

The board dismissed the complaint on the grounds that it was premature. The board stated that an application is ripe for Commission review when there is either a binding agreement between the parties to a transaction for which Commission approval is necessary or when there is a situation where a party is ready and able to take an action requiring Commission approval. See *Magner-O'Hara Scenic Railway-Operation-In the State of Michigan* (not printed) decided May 6, 1981. The board found that before MoPac can begin to construct its proposed classification yard on complainants' land, it must first be victorious in the pending civil action. Because a civil decision against MoPac may moot the issue of whether Commission approval of the construction is required, the board concluded that the complaint was premature and dismissed it.

DISCUSSION AND CONCLUSIONS

Section 10901 provides that a rail carrier can "construct an extension to any of its railroad lines," or "construct an additional railroad line," only if the Commission certifies that the present or future public convenience and necessity require or permit the construction. MoPac has neither

---

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

sought nor obtained Commission certification of its project. Accordingly, the only issues before us are (1) whether "construction" within the meaning of section 10901 has occurred; and (2) if so, whether it involves construction of "an extension to" or an "additional railroad line."

Construction. — The board found that the bringing of a condemnation proceeding does not constitute "construction" within the meaning of section 10901. We cannot agree.

First, the board's finding would effectively deprive complainants of a forum in which to determine our jurisdiction over the proposed project. As demonstrated by complainants, Commission approval of a proposed construction must be obtained far enough in advance of a railroad's commitment so that the Commission will have time to review and evaluate the operational, financial, and environmental effects of the proposal. Here, MoPac has clearly stated its belief that no Commission approval is required and it is apparent that MoPac intends to commence construction as soon as the land is condemned. Accordingly, if we do not take jurisdiction now, construction would begin and complainants' property confiscated and damaged before we could determine whether the project was within our jurisdiction and if so, whether it should be approved. Failure to review the matter prior to the condemnation of complainants' land would be particularly unfair since complainants have no other forum in which to raise this issue. See 49 U.S.C. 11701(b). It is clearly appropriate to examine the merits of the complaint.

Second, the board's decision is contrary to the only decision directly on point. In *Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387 (5th Cir. 1969), a railroad had begun condemnation proceedings in state court to obtain right of way for a proposed extension. No Commission approval had been obtained, so a competing railroad filed suit in Federal district court to enjoin the

State court proceeding. The court enjoined proceedings to prevent violation of Federal law which would otherwise occur, finding that:

> [t]here appears to be no serious question that an attempt to condemn lands for the purposes of constructing new trackage thereon without first acquiring a certificate from the Interstate Commerce Commission constitutes "construction" within the meaning of this statute.

418 F.2d at 393. See also *Gilmore* v. *Sandersville R. Co.*, 149 F. Supp. 725 (M.D. Ga 1955); *Smyth* v. *Asphalt Bell Ry. Co.*, 12 F.2d 14 (5th Cir. 1926). We agree with the court in *Tampa Phosphate* that the condemnation of right-of-way to construct a railroad line is "construction" which triggers the approval requirements of 49 U.S.C. 10901.

The board cited *Magner-O'Hara Scenic Railway-Operation-In the State of Michigan*, served February 4, 1980, July 22, 1980, and May 12, 1981 (not printed) in support of its finding that the complaint should be dismissed as premature. There division 1 dismissed an application for authority to operate a passenger rail service because the service required trackage rights over another carrier which that carrier refused to grant and which, even if they could be obtained, would require additional Commission approval.[4] *Magner-O'Hara* is not determinative here for two reasons. First, under *Tampa Phosphate*, the condemnation proceeding itself is "construction" within the meaning of section 10901; this condemnation proceeding, if begun to construct a railroad line, is itself a violation of the section. Second, failure of the Commission to take action has a substantially different impact here than *Magner-O'Hara*. In that case, no operations could begin — and no party could

[4] A subsequent decision found the entire proposed operation to be outside our jurisdiction.

be harmed — until successful negotiation of and approval of a trackage rights agreement. Here, complainants have shown a substantial probability that if the Commission waits, complainant would be harmed by the challenged conduct before the Commission could determine its legality.

In sum, the bringing of a condemnation proceeding constitutes "construction," and we will review the merits of the complaint.

Railroad line. — The complaint alleges that MoPac is violating the act by constructing an addition to or extension of railroad line without prior Commission approval. MoPac's proposed classification yard is described in the record. The sole question before us, then, is whether construction of this yard might be considered the construction of a "railroad line."

The term "railroad line" is not defined in the act,[5] nor is the legislative history useful in resolving the issue. However, a separate section of the act excludes from the requirements of section 10901 — again without further explanation — all "spur, industrial, team, switching and side track located, or intended to be located, entirely in one State." 49 U.S.C. 10907(b). Accordingly, we must look to case law and to common sense to determine whether a proposed classification yard could qualify as a rail line.

At the outset, we note that there are a large number of classification yards in this country, and many have been

---

[5] Complainants argued before the board that "railroad line" must include a classification yard because "railroad" is defined to include "a switch, spur, track, terminal facility, and a freight yard depot, yard, and ground used or necessary for transportation." 49 U.S.C. 10102(19)(C). This argument does not withstand scrutiny; it would imply, for example, that a carrier needs our approval before acquiring "ground" to be used to construct a communications facility. A railroad clearly requires some property that cannot be considered a "railroad line." We must look beyond the definition of "railroad" to define "railroad line."

built since 1920 (when we obtained authority over the construction of railroad lines).[6] Yet complainants have cited, and we have found, no instance in which the Commission has found that the construction of a classification yard — or of any other yard — to require Commission approval under section 10901 or its predecessor, section 1(18) of the Interstate Commerce Act.

We need not look far to explain why this issue arises so rarely: in the few instances in which it has been raised, yard track has been found clearly exempt. In *Georgia Southern and Florida Ry.* v. *Duval Connecting R.R.*, 324 F.2d 801 (5th Cir. 1963) the court held that construction of a classification yard similar to the yard proposed here was switching track which did not require Commission approval. Similarly, in *Terminal Ry. Ala State Docks — Operation, Mobile, AL*, 354 I.C.C. 747, 749 (1978), division 1 found exempt "certain rail yard properties," which were to be used as "a switching yard and to furnish connection terminal switching." Again, in *Florida E. C. Ry. Co. Petition for Declaratory Order*, 360 I.C.C. 272 (1979), the Commission observed that by contrast [to trackage which is a portion of a railroad line] trackage exempted under former section 1a(a) is characterized by its use "in the loading, reloading, storage, and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee." Cf. *Sioux City Term. Ry. Switching*, 241 I.C.C. 53, 90 (1940).

Complainants cite *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966) as holding that trackage should be considered an addition or extension of railroad line if it is an essential part of a continuous through journey in interstate commerce and not merely incidental to a line-haul movement.[7] They urge that the proposed classifi-

[6] See, *e.g.*, the *Railway Age* article cited by complainants in their reply to defendant's motion to dismiss (p. 6).

[7] The court there said: "[I]f there are traffic movements which are part of the actual transportation haul from shipper to consignee

cation yard is to be used as part of the actual transportation haul from shipper to consignee, not merely as incidental to a line haul movement and they rely upon testimony submitted by MoPac indicating that its new yard would enable it to expand its markets and to serve additional shippers.

Complaintants' reliance on *New Orleans Terminal Co.* is misplaced. The court there reviewed not yard trackage, but a side track which was used for the passage of through trains. By contrast, the proposed classification yard is and can be used only for storage, switching, and classification. The transportation will continue to move over MoPac's existing main line. No shippers are located in the vicinity of the yard or will be directly served from the yard. No lines of any other carrier will reach the yard, so it cannot serve as a connecting track between two carriers. Compare *Duluth, S.S. & A.R. Co.* v. *Chicago, M., St. P. & P.R. Co.*, 307 I.C.C. 311 (1959). MoPac clearly believes that the yard will allow it to provide more extensive and efficient service over its existing rail lines and may permit it to capture additional traffic. However, we are convinced that the proposed yard is not a line of railroad or an extension of a line within the meaning of section 10901, since the operations to be performed at the yard are incidental to line-haul transportation.[8]

---

then the trackage over which the movement takes place is a line of railroad, or any extension thereof." 366 F.2d at 165-66.

[8] Complainants appear to argue that the Commission should have jurisdiction over the construction because it is a significant financial undertaking requiring from 40 to $60 million. Congress did not, however, give us jurisdiction over every railroad expenditure. Our jurisdiction over construction is limited to additions to or extensions of railroad lines, which generally occurs when a construction permits a carrier to penetrate a new market. See generally *Texas & P. Ry. Co.* v. *Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266 (1926). *Chicago Great Western Ry Co.* v. *Illinois Central Gulf R. Co.*, 275 F. Supp. 909 (1967).

We conclude that complainants' appeal, except as discussed above, is without merit and should be denied. The board's dismissal of the complaint is affirmed on the ground that we have no jurisdiction over the proposed construction.

This decision will not significantly affect the quality of the human environment or the consumption of energy.

It is ordered.

1. The petitions for leave to intervene filed by the Louisiana Soybean Association, the American Farm Bureau Federation, and the Louisiana Farm Bureau Federation are denied.

2. The complainants' administrative appeal, except as discussed in the decision, is denied.

3. The prior decision of Review Board No. 3 is affirmed.

4. This decision shall be effective when it is served.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Clapp, Gresham and Taylor. Commissioner Taylor is assigned to this division for the purpose of resolving tie votes. Since there was no tie in this matter, Commissioner Taylor did not participate.

AGATHA L. MERGENOVICH,
Secretary

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29657

JERRY K. NICHOLSON, NICK H. BRUCKERHOFF, OLIVER MAJOR AND HALLOWAY PLANTING CO. v. MISSOURI PACIFIC RAILROAD COMPANY

Decided August 28, 1981

On May 22, 1981, a complaint against the Missouri Pacific Railroad Company (MoPac) was filed by Jerry K. Nicholson. The complaint was brought under 49 U.S.C. § 11701 and the Commission's Rules, specifically 49 CFR 1100.26, and alleges a violation of 49 U.S.C. § 10901. On June 3, 1981, the complaint was supplemented to include three additional plaintiffs, Nick H. Bruckerhoff, Oliver Major, and Halloway Planting Co. On July 23, 1981, MoPac moved to dismiss plaintiff's complaint and supplemental complaint. Plaintiffs filed a reply.

Complainants allege that they are the owners of certain tracts of land located near Livonia in Pointe Coupee Parish, LA, over which MoPac, a rail carrier providing transportation subject to the jurisdiction of this Commission, owns a right-of-way for the operation of a single line track of railroad.

Complainants state that MoPac seeks to expropriate portions of their property to construct a new railroad yard facility and related facilities and appurtenances. To effect this acquisition MoPac has filed and is prosecuting a judicial action in the 18th Judicial District Court for the Parish of Pointe Coupee, State of Louisiana, Civil Action No. 17299, Division B, *Missouri Pacific Railroad Company* v.

Jerry K. Nicholson, Elizabeth Nicholson Fischer and James W. Smither III, as Trustees of the Leonard K. Nicholson Trust; El Tres Petroleum Corporation; and Nick H. Bruckeroff.

Complainants allege that MoPac has never sought nor received a necessary determination by this Commission under 49 U.S.C. § 10901 that the public convenience and necessity permit or require the proposed construction. Complainants accordingly request that MoPac be ordered to cease and desist from taking any further action to construct or to prepare for construction any additional rail lines over the property of complainants.

MoPac states that the proposed new railroad facility is a classification yard that will not serve any new shippers or extend the existing line of railroad into any new territory. MoPac urges that the Commission has never held that a classification yard is a railroad line or a line of railroad, or that Commission approval is required for the construction of a classification yard. MoPac accordingly urges dismissal of the complaint and supplemental complaint.

We believe that the complaint should be dismissed but for a different reason than that advanced by MoPac. An application is ripe for Commission review when there is either a binding agreement reached between the parties to a transaction for which Commission approval is necessary or when there is a situation where a party is *ready* and *able* to undertake an action for which Commission approval is required. *Magner-O'Hara Scenic Railway — Operation, — In the State of Michigan,* decisions served February 4, 1980, July 22, 1980, and May 12, 1981 (not printed).

Here, MoPac would like to construct its proposed classification yard on complainants' land but it first must be victorious in a pending and contested civil action. A trial has been set for January, 1982, and indeed a decision (especially if appealed) may be a long way off. A civil decision against

MoPac may totally moot the issue of whether Commission approval of MoPac's construction is required. Accordingly, we believe the complaint is premature.

It is ordered:

1. The complaint and supplemental complaint are dismissed.

2. This decision is effective on the date of service.

By the Commission, Review Board Number 3, Members Krock, Joyce, and Dowell.

AGATHA L. MERGENOVICH,
Secretary

(SEAL)

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 82-1428

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

LOUISIANA SOYBEAN ASSOCIATION,
MISSOURI PACIFIC RAILROAD COMPANY,

Intervenors.

Petition For Review Of An Order Of The Interstate Commerce Commission

Before: Robinson, Chief Judge, Wald, Circuit Judge, and MacKinnon, Senior Circuit Judge

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Interstate Commerce Commission, and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the order of the Interstate Commerce Commission under review herein is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 30 1983

GEORGE A. FISHER
CLERK

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 30, 1983.
Opinion for the Court filed by Senior Circuit Judge Mackinnon.

OTION FILED
OCT 26 1983

No. 83-533

In the Supreme Court of the United States

OCTOBER TERM, 1983

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA; LOUISIANA SOYBEAN ASSOCIATION; AND MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION OF THE AMERICAN FARM BUREAU FEDERATION AND LOUISIANA FARM BUREAU FEDERATION INC. FOR LEAVE TO FILE AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

HENRY H. BERNARD
Counsel
LOUISIANA FARM BUREAU FEDERATION, INC.
P.O. Box 15361
Baton Rouge, LA 70895
(504) 926-1944

JOHN J. RADEMACHER
Counsel of Record
MICHAEL J. STIENTJES
Assistant Counsel
AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, IL 60068
(312) 399-5732

Attorneys For Amici Curiae American Farm Bureau Federation and Louisiana Farm Bureau Federation, Inc.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Motion of American Farm Bureau Federation and Louisiana Farm Bureau Federation, Inc., for leave to file brief Amici Curiae, and brief Amici Curiae in support of petitioners 1

Interest of American Farm Bureau and Louisiana Farm Bureau Federation, Inc. 2

Substance of the brief Amici Curiae 3

Reasons for granting this motion 4

Brief of American Farm Bureau Federation and Louisiana Farm Bureau Federation, Inc., as Amici Curiae 5

Interest of Amici Curiae and Summary of Argument 6

Argument 7

I.

The loss of prime agricultural land is a serious national problem 7

II.

Federal law and policy dictate that prime agricultural land be preserved when possible and will be subverted if the Interstate Commerce Commission is permitted to unlawfully deregulate the construction of railroad classification yards 8

Conclusion 12

TABLE OF AUTHORITIES

Statutes

PAGE

7 U.S.C. §4201-4209 ..... 3, 9

7 U.S.C. §4201(b) 10

7 U.S.C. § 4201(a)(7) 10

7 U.S.C. §4201(c)(4) 11

Regulations

40 C.F.R. §1501 *et seq.* 9

Other Authorities

National Agricultural Lands Study 7, 8

45 Federal Register 59189 (1980) 9

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-533

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA; LOUISIANA SOYBEAN ASSOCIATION; AND MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION OF THE AMERICAN FARM BUREAU FEDERATION AND LOUISIANA FARM BUREAU FEDERATION, INC. FOR LEAVE TO FILE BRIEF AMICI CURIAE

American Farm Bureau Federation and Louisiana Farm Bureau Federation, Inc., respectfully move this Court for leave to file the accompanying brief amici curiae in support of the petitioner in this case. Written consent of the petitioner Jerry K. Nicholson and the respondents, Louisi-

ana Soybean Association, Interstate Commerce Commission and United States of America have been obtained and are filed herewith. Consent of the respondent Missouri Pacific Railroad Company was requested but refused.

INTEREST OF AMERICAN FARM BUREAU FEDERATION AND LOUISIANA FARM BUREAU FEDERATION, INC.

The American Farm Bureau Federation (AFBF) is a voluntary, general farm organization, organized in 1919 under the "General Not For Profit Corporation Act" of the State of Illinois, with its principle office in Park Ridge, Illinois. The purpose of AFBF is the promotion, protection and representation of the business, economic, social and educational interests of the farmers and ranchers of the United States. AFBF has member State Farm Bureaus in 48 states and Puerto Rico, representing more than 3 million member families.

Louisiana Farm Bureau Federation, Inc., (LFBF) is a nonprofit agricultural corporation organized under the law of Louisiana and domiciled in the Parish of East Baton Rouge. LFBF is dedicated to the promotion of the production and marketing of agricultural products in the State of Louisiana. LFBF is comprised of over 63,000 member farm families in the State of Louisiana, which representation includes substantial membership in the Parish of Pointe Coupee.

The interest of AFBF and LFBF in this case is to represent and protect the economic interest of Farm Bureau members who are engaged in producing food and fibre, and who will be generally impacted by the loss of prime farmland needed for present and future production.

AFBF and LFBF support the petitioner's position that the respondent Interstate Commerce Commission has been permitted by the Court of Appeals to deregulate the construction of railroad classification yards in a manner contrary to legal requirements and adverse to an orderly reduction in that agency's jurisdiction. Central to this issue is the permanent loss of a vast amount of prime farmlands without consideration of the present and future value and need of such lands for agricultural production as is required by Federal policy and law.

SUBSTANCE OF THE BRIEF AMICI CURIAE

The brief amici curiae discusses the importance of prime farmland to the continued well being of the people of the United States and that the loss of prime farmland through conversion to nonagricultural uses, such as a railroad classification yard, has become a serious national problem. In recognition of the seriousness of this problem, Congress enacted the Farmland Protection Policy Act as part of the Agriculture and Food Act of 1981 (P.L. 97-98; 7 USC 4201-4209) to minimize the extent to which any Federal action will contribute to the unnecessary and irreversible loss of prime farmland to nonagricultural uses. The actions and programs contemplated by the Farmland Protection Policy Act include regulatory actions by the Interstate Commerce Commission over railroads and railroad line extensions or additions.

REASONS FOR GRANTING THIS MOTION

AFBF and LFBF seek this Court's permission to express their views in this case because the Courts' disposition herein of the question regarding the regulatory jurisdiction of the Interstate Commerce Commission over railroad classification yards will profoundly affect the rate and amount of prime farmlands in the United States that are converted to nonagricultural uses and permanently lost to agricultural production. Accordingly, AFBF and LFBF had requested, but were denied, leave to intervene in the Interstate Commerce Commission, proceeding [see *Nicholson* v. *Missouri Pacific R.R.*, 366 I.C.C. 69 n.2 (1982)] and filed briefs amicus curiae in the review proceeding at the court of appeals.

Respectfully submitted,

HENRY H. BERNARD
Counsel
LOUISIANA FARM BUREAU FEDERATION, INC.
P.O. Box 15361
Baton Rouge, LA 70895
(504) 926-1944

JOHN J. RADEMACHER
Counsel of Record
MICHAEL J. STIENTJES
Assistant Counsel
AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, IL 60068
(312) 399-5732

Attorneys for Amici Curiae American Farm Bureau Federation and Louisiana Farm Bureau Federation, Inc.

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-533

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA; LOUISIANA SOYBEAN ASSOCIATION; AND MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMERICAN FARM BUREAU FEDERATION AND LOUISIANA FARM BUREAU FEDERATION, INC., AS AMICI CURIAE

American Farm Bureau Federation and Louisiana Farm Bureau Federation, Inc., respectfully submit this brief in support of petitioner's position.

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

A statement describing the American Farm Bureau Federation and Louisiana Farm Bureau Federation, Inc., and their interest herein is set forth in the preceding motion requesting leave to file this brief amici curiae. Also, a summary of the following arguments is set forth in the preceding motion under the heading "Substance of the Brief Amici Curiae."

ARGUMENT

I.

THE LOSS OF PRIME AGRICULTURAL LAND IS A SERIOUS NATIONAL PROBLEM

American Farm Bureau Federation (AFBF) and Louisiana Farm Bureau Federation, Inc., (LFBF) are vitally concerned about the rising tide of involuntary takings of prime farmlands as a valuable national resource for utility, recreation, wildlife, urban, water, industrial, and transportation uses without considering the effects of the loss of such farmland.

The National Agricultural Lands Study,[1] in its Final Report issued in January, 1981, estimates that agricultural land is being converted to non-agricultural purposes at the rate of approximately 3 million acres per year.[2] This figure does not include the potential loss of additional or adjacent land which may also be taken out of agricultural production because it is uneconomical to farm the remaining portion. Once agricultural lands have been converted for other purposes, they are irretrievably and irrevocably lost as a source of food and fiber production. The loss of agricultural land also means a decrease in the number of

[1] The National Agricultural Lands Study was an interagency study of the availability of U.S. farmland which studied the extent and causes of farmland conversion and ways in which these lands might be retained for agricultural purposes. Formed in June, 1979, participating agencies included all the Cabinet level departments, Council on Environmental Quality, Environmental Protection Agency and the Water Resources Council.

[2] National Agricultural Lands Study, Final Report, p. 2.

producers and a decrease in the capacity to produce food and fiber. At the same time, however, the population of the United States is steadily increasing. Currently the United States is virtually self-sufficient in providing food for its populace, despite the fact that only 4% of the population is actively engaged in agriculture. In order to ensure our continued self-sufficiency in agriculture and to meet the expanding needs of a growing population, it is necessary to protect the agricultural resources that we have.

The National Agricultural Lands Study singles out the South as the area where loss of agricultural cropland is especially acute. The Final Reports states that more more than half of the U.S. agricultural land lost between the period 1967 and 1975 was in the South.[3] It estimates that 250,000 acres of agricultural land are converted each year in Louisiana alone.

Rapid population growth in the South will increase the demands for conversion of agricultural lands by industry, urban development and transportation.

II.

FEDERAL LAW AND POLICY DICTATE THAT PRIME AGRICULTURAL LAND BE PRESERVED WHEN POSSIBLE WILL BE SUBVERTED IF THE INTERSTATE COMMERCE COMMISSION IS PERMITTED TO UNLAWFULLY DEREGULATE THE CONSTRUCTION OF RAILROAD CLASSIFICATION YARDS

The Federal Government is also concerned about the disappearance of prime agricultural land and the possible effects on future generations of Americans.

---

[3] National Agricultural Lands Study, Final Report, p. 19-20.

The Council on Environmental Quality published in the *Federal Register* (Vol. 45, No. 175, p. 59189) a memorandum entitled "Analysis of Impacts on Prime or Unique Agricultural Lands in Implementing the National Environmental Policy Act."

Issued August 11, 1980, the purpose of the memorandum was "to alert federal agencies to the need and opportunities to analyze agricultural land impacts more effectively in the project planning process and under the National Environmental Policy Act (NEPA)." In conjunction with CEQ Regulations (40 CFR 1501 *et seq.*), the memorandum firmly establishes the Federal policy that "[d]etermining the effects of a proposed Federal agency action on prime or unique agricultural lands must be an integral part of the environmental assessment process and must be a factor in deciding whether or not to prepare an environmental impact statement." Because prime and unique agricultural lands are a limited and valuable resource, the Council on Environmental Quality urged all agencies to make a particularly careful effort to apply the goals and policies of the National Environmental Policy Act to their actions and to obtain necessary assistance in their planning processes so that these lands will be maintained to meet our current national needs and the needs of future generations of Americans.

The "Farmland Protection Policy Act of 1981" (P.L. 97-98; 7 U.S.C. §4201-4209) enacted this policy into law. The stated purpose of the Act is to:

> minimize the extent to which Federal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses and to assure that Federal programs are administered in a manner that,

> to the extent practicable, will be compatible with State, unit of local government, and private programs and policies to protect farmland. [7 U.S.C. §4201(b)].

In carrying out this purpose, the Act states:

> the Department of Agriculture and other Federal agencies should take steps to assure that the actions of the Federal Government do not cause United States farm land to be irreversibly converted to nonagricultural uses in cases in which the importance of the protection of farmland nor otherwise outweigh the benefits of maintaining farmland resources. [7 U.S.C. §4201(a)(7)].

The Act charges the Department of Agriculture, "in cooperation with other departments, agencies, independent commissions, and other units of the Federal Government," with developing criteria for identifying the effects of federal programs on the conversion of agricultural lands to non-agricultural uses. Once such criteria are developed, all units of Federal Government are to use these criteria "to identify and take into account the adverse effects of Federal programs on the preservation of farmland" and "consider alternative actions, as appropriate, that could lessen such adverse effects." The Federal policy and mandate with regard to loss of agricultural lands is clear. Any federal action which could possibly jeopardize the existence of prime agricultural lands must fully consider the effects of the loss of such lands and seek alternatives that would minimize such effects.

AFBF and LFBF support the petitioner's position that the respondent Interstate Commerce Commission has been permitted by the Court of Appeals to deregulate the construction of railroad classification yards in a manner con-

trary to legal requirements and adverse to an orderly reduction in that agency's jurisdiction. Central to this issue is the permanent loss of a vast amount of prime farmlands without consideration of the present and future value and need of such lands for agricultural production.

The Federal programs to which the Farmland Protection Policy Act applies are defined to mean:

> those activities or responsibilities of a department, agency, independent commission, or other unit of the Federal government that involve (A) undertaking, financing, or assising construction or improvement projects; or (B) acquiring, managing, or disposing of Federal lands and facilities. [7 U.S.C. §4201(c)(4)].

The regulatory actions of the Interstate Commerce Commission, with respect to railroads and railroad line extentions or additions, are clearly "Federal programs" for which the Act requires that the Interstate Commerce Commission shall identify any negative effects, with regard to the protection of agricultural land, resulting from any proposed action and take into consideration alternative actions that could lessen the negative effects. If the Interstate Commerce Commission is allowed to deregulate the construction of railroad classification yards in a manner contrary to legal requirements, then the farmland protection policies of the Federal Government will be subverted and frustrated.

CONCLUSION

The irretrievable loss of prime agricultural land to non-agricultural uses is occurring at a rapid rate throughout the United States, especially in the South. Both the Council on Environmental Quality and Congress have enacted federal policy to preserve and protect prime agricultural lands. The Farmland Protection Policy Act requires Federal agencies and other units of the Federal Government to consider the effects of loss of prime farmland from any proposed Federal action, and to consider alternatives that would minimize such losses.

If the decision of the Court of Appeals is allowed to stand and railroads are permitted to take prime agricultural land through line extensions and additions without Interstate Commerce Commission hearings and determinations, then established Federal policy on this serious national problem would be wrongfully subverted.

WHEREFORE, Amici Curiae, American Farm Bureau Federation and Louisiana Farm Bureau Federation respectfully pray that this Court grant the writ of certiorari and reverse the decision below.

Respectfully submitted,

HENRY H. BERNARD
Counsel
LOUISIANA FARM BUREAU
FEDERATION, INC.
P.O. Box 15361
Baton Rouge, LA 70895
(504) 926-1944

JOHN J. RADEMACHER
Counsel of Record
MICHAEL J. STIENTJES
Assistant Counsel
AMERICAN FARM BUREAU
FEDERATION
225 Touhy Avenue
Park Ridge, IL 60068
(312) 399-5732

Attorneys for Amici Curiae American Farm Bureau Federation and Louisiana Farm Bureau Federation, Inc.

MOTION FILED

NOV 23 1983

NO. 83-533

In the Supreme Court of the United States

OCTOBER TERM, 1983

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA; LOUISIANA SOYBEAN ASSOCIATION; AND MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF LOUISIANA LANDMARKS SOCIETY, AMICUS CURIAE

GENE W. LAFITTE
(Counsel of Record)
WILLIAM R. PITTS
50th Floor, One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-7979

Attorneys for Louisiana Landmarks Society, Amicus Curiae

Date: November 17, 1983

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-533

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA;
LOUISIANA SOYBEAN ASSOCIATION; AND
MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rules 36.1 and 42.2(b) of the Rules of this Court, Louisiana Landmarks Society (the "Society") hereby requests leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari filed by Jerry K. Nicholson in the referenced case. In support of this request, the Society states as follows:

1. The case at bar involves the Interstate Commerce Commission's disclaimer of jurisdiction over the construction, by Missouri Pacific Railroad Company ("Missouri Pacific"), of a major railroad facility on farmland in Louisiana largely owned by Petitioner Nicholson. That facility is to be located in close proximity to Nicholson's home, which predates the Civil War and has been listed in the National Register of Historic Places. The railroad yard, if built, will seriously detract from the aesthetic qualities of that landmark.

2. Louisiana Landmarks Society, the largest and oldest preservation organization in the State of Louisiana, takes an active interest in the preservation of historical landmarks such as Nicholson's home, and wishes to present its views on that subject. The Society is in a unique position to make such a presentation; no other party appears to have focused on the historical preservation aspect of this case. Historical considerations, of course, are appropriate under section 101 of the National Environmental Policy Act, 42 U.S.C. § 4331 (1976), as implemented by the Interstate Commerce Commission ("Commission"). *See* 49 C.F.R. § 1105.7(a)(10) (1982). By disclaiming jurisdiction over Missouri Pacific's railroad yard construction, the Commission has overlooked an important point that it would have considered if it had been made a "public convenience and necessity" evaluation pursuant to 49 U.S.C. § 10901(a) (Supp. V 1981), or even if it had granted an exemption pursuant to 49 U.S.C. § 10505 (Supp. V 1981).

3. The Society has asked the parties for their consent to the filing of this brief. Petitioner, and Respondents Louisiana Soybean Association and Interstate Commerce Commission, have given their consent. Missouri Pacific Railroad Company and the United States of America,

however, have not consented, necessitating this motion.

4. Acceptance of the very short brief that the Society proposes to file (*see* attached) should not burden the Court. On the contrary, it should enhance the Court's consideration of the issues.

WHEREFORE, it is respectfully requested that the attached brief *amicus curiae* be accepted for filing.

Respectfully submitted,

Gene W. Lafitte
(Counsel of Record)
William R. Pitts
50th Floor, One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-7979

Attorneys for Louisiana Landmarks Society

Date: November 17, 1983

TABLE OF AUTHORITIES

Page

42 U.S.C. §1500a(d) (1976) 2
42 U.S.C. § 4331 (1976) 2
49 U.S.C. § 10505 (Supp. V 1981) 2
49 U.S.C. § 10901(a) (Supp. V 1981) 2
49 C.F.R. §§ 1105.6 (1982) 2
49 C.F.R. §§ 1105.7(a)(10) (1982) 2

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-533

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA; LOUISIANA SOYBEAN ASSOCIATION; AND MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF LOUISIANA LANDMARKS SOCIETY, AMICUS CURIAE

Louisiana Landmarks Society (the "Society"), *amicus curiae,* hereby submits its brief in support of the September 28, 1983, petition for a writ of certiorari filed by Jerry K. Nicholson ("Nicholson") in the referenced case.

The Society, with approximately 1,500 members, is the largest and oldest historical preservation organization

in the State of Louisiana. Over the years it has registered its support, in various proceedings, for the preservation of landmarks in the state.

The outcome of this case is of interest to the Society because an historical landmark is located immediately adjacent to the railroad classification yard that the Missouri Pacific Railroad Company ("Missouri Pacific") proposes to build. Petitioner Nicholson's home is of pre-Civil War construction and, indeed, is listed in the National Register of Historic Places provided for in 42 U.S.C. § 1500a(d) (1976). The $75 million, 550-acre railroad yard that Missouri Pacific proposes to build will be largely on Nicholson's land and will be located a mere 1,000 feet from the historical structure in question. The construction of so large a railroad facility so close to an important landmark will seriously detract from the aesthetic qualities of that landmark.

The effect of such construction on an historical landmark, of course, falls within the ambit of section 101 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (1976), and thus is one factor appropriately and normally taken into consideration by the Interstate Commerce Commission (the "Commission"). *See* 49 C.F.R. §§ 1105.6 and 1105.7(a)(10) (1982). By disclaiming jurisdiction over Missouri Pacific's railroad yard construction, the Commission has overlooked an important point that it would have considered if it had made a "public convenience and necessity evaluation" pursuant to 49 U.S.C. § 10901(a) (Supp. V 1981), or even if it had granted an exemption pursuant to 49 U.S.C. § 10505 (Supp. V 1981).

Accordingly, Louisiana Landmarks Society urges the Court to grant Nicholson's petition for a writ of

certiorari. On review the Court should direct the Interstate Commerce Commission to consider whether Missouri Pacific's proposed railroad yard construction meets the statutory "public convenience and necessity" standard, once all pertinent factors, including the historical value of the landmark on Nicholson's property, are taken into account.

Respectfully submitted,

GENE W. LAFITTE
(Counsel of Record)
WILLIAM R. PITTS
50th Floor, One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-7979

Attorneys for Louisiana Landmarks Society, Amicus Curiae

Date: November 17, 1983

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

RECEIVED
NOV 23 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

November 23, 1983

Honorable Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Nicholson v. ICC, et al., No. 83-533

Dear Mr. Stevas:

In his motion for leave to file an amicus brief in this case on behalf of Louisiana Landmarks Society, Mr. Pitts states that the Solicitor General refused to consent to the filing. On November 14, Mrs. Shapiro of my office, the attorney responsible for reviewing the government's filing in this case, informed Mr. Pitts that, although it is my policy to consent to amicus filings by any party who has an interest in the disposition of a case, my consent must be given in writing in response to a written request. Mr. Pitts has made no such written request, and I have therefore had no occasion to consent -- much less to refuse consent -- to his filing.

The motion also states that ICC consented to the filing. I am informed that the ICC attorney responsible for the case told Mr. Pitts that, although the ICC had no objection to the Society's amicus participation, any consent from the government to that participation would have to come from this office.

Sincerely,

Rex E. Lee

Rex E. Lee
Solicitor General

cc: see attached

cc: Fritz R. Kahn, Esq.
Russell E. Pommer, Esq.
Verner, Liipfert, Bernhard and McPherson
Suite 1100
1660 L Street, N.W.
Washington, D.C. 20036

John P. Legendre, Esq.
505 North Industrial Boulevard
Dallas, Texas 75207

Gene W. Lafitte, Esq.
William R. Pitts, Esq.
50th Floor
One Shell Square
New Orleans, Louisiana 70139

John J. Rademacher, Esq.
General Counsel
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, Illinois 60068

Henry H. Bernard, Esq.
Louisiana Farm Bureau Federation, Inc.
P.O. Box 15361
Baton Rouge, Louisiana

F. W. Read, III, Esq.
Robert B. Batchelder, Esq.
1416 Dodge Street
Omaha, Nebraska 68179